(2)

No. 04-1380

Supreme Court, U.S.
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In The

Supreme Court of the United States

JARNIS UNITED PROPERTIES CO.,

Petitioner,

v.

SIGMUND LEFKOVITZ, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING PURSUANT TO RULE 14.1(b)

The following are the parties to this proceeding:

Respondents

Parties Represented: Sigmund Lefkovitz; Arlene Lefkovitz; Glenn Paul Lefkovitz; Irving Lefkovitz; June Lefkovitz; Sigmund Lefkovitz Family Trust for the Family of Shelley Ann, u/a/d July 31, 1973, Gayle R. Dougherty, Trustee; Sigmund Lefkovitz Family Trust for the Family of Glenn Paul u/a/d July 31, 1973, Nina Mann, Trustee; Sigmund Lefkovitz Family Trust for the Family of Nina Joy, u/a/d July 31, 1973, Shelley Loyd, Trustee; Sigmund Lefkovitz Family Trust for the Family of Gayle Ruth, u/a/d July 31, 1973, Glenn Paul Lefkovitz, Trustee; Sigmund Lefkovitz Family Trust for the Family of Donna Jean, u/a/d July 31, 1973, Shelley Loyd, Trustee; Lefkovitz 1987 Family Trust, Glenn Lefkovitz, Gayle Dougherty and Donna Neshek, Trustees; Halsted #2 Trust, Sigmund Lefkovitz, Trustee; Halsted #3, Sigmund Lefkovitz, Trustee; Halsted #4, Sigmund Lefkovitz, Trustee; Halsted #5, Sigmund Lefkovitz, Trustee; Lefkovitz Numbered Family Trust #7, Sigmund Lefkovitz, Trustee; and Lefkovitz Numbered Family Trust #8, Sigmund Lefkovitz, Trustee.

Other Parties: Nathan Wagner; Wagner Associates; Robert U. Goldman; Robert U. Goldman, Ltd.; Jay Felner; Albert Schwartzberg; NCIS Co.; New Century Investor Services; and 29-31 Associates.

Petitioner

Jarnis United Properties Co.

STATEMENT PURSUANT TO RULE 29.6

Respondents state that they have no parent corporations or subsidiaries and that no publicly held company owns 10% or more of them or their stock.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING PURSUANT TO RULE 14.1(b)	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
FACTUAL BACKGROUND	5
REASONS FOR DENYING THE PETITION	12
THE RULING BELOW WAS DECIDED ON THE SPECIFIC FACTS OF THIS CASE AND DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON AN IMPORTANT FEDERAL QUESTION	12
A. The Fact-Specific Decision Below Affirming Confirmation Of The Arbitration Award Does Not Conflict With Existing Law	13
B. Jarnis Cites To No Conflict Of Decision Or Principle Of Public Importance To Warrant Review Of The Denial Of Jarnis' Motion For Intervention, And Jarnis' Intervention Motion Was Properly Denied In Any Event	19
1. Timely Application	20
2. Adequate Representation	21
CONCLUSION	23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Braxton v. United States, 500 U.S. 344 (1991) 12

Bruscianelli v. Triemstra, No. 99 C 6446, 2000 WL 1100439 (N.D. Ill. Aug. 4, 2000) 16

Dighello v. Busconi, 673 F. Supp. 85 (D. Conn. 1987) 15, 16

IBEW Local 265 v. O.K. Elec. Co., 793 F.2d 214 (8th Cir. 1986) 15

Layne & Bowler Corp. v. W. Well Works, Inc., 261 U.S. 387 (1923) 12

Lefkovitz v. Wagner, 395 F.3d 773 (7th Cir. 2005) 1

Maul v. Aznavoorian, No. C 96-2965 TEH, 1997 WL 16313 (N.D. Cal. Jan. 9, 1997) 16

Meridian Homes Corp. v. Nicholas W. Prassas & Co., 683 F.2d 201 (7th Cir. 1982) 22

Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264 (7th Cir. 1988) 18

NAACP v. New York, 413 U.S. 345 (1973) 20

Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843 (6th Cir. 2003) 14-15

NCR Corp. v. Sac-Co., Inc., 43 F.3d 1076 (6th Cir. 1995) 15

Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S.A., 312 F.2d 299 (2d Cir. 1963) 14

Pacific Reinsur. Mgmt. Corp. v. Ohio Reinsur. Corp., 935 F.2d 1019 (9th Cir. 1991) 15

Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., No. 92 CIV. 7916 (SWK), 1993 WL 362391 (S.D.N.Y. Sept. 14, 1993) 16

TABLE OF AUTHORITIES – Continued

Page

Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70 (1955) 12, 19

Schultz v. Connery, 863 F.2d 551 (7th Cir. 1988) 21

Shea v. Angulo, 19 F.3d 343 (7th Cir. 1994) 20-21

United States v. Johnston, 268 U.S. 220 (1925) 12

STATE CASES

Asociacion De Perjudicados Por Inversiones Efectuadas En U.S.A. v. Citibank, F.S.B., 770 So. 2d 1267 (Fla. Dist. Ct. App. 2000) 18

Fidelity & Cas. Co. of N.Y. v. Homan, 116 So. 2d 444 (Fla. Dist. Ct. App. 1959) 18, 22

Louis Benito Adver., Inc. v. Brown, 517 So. 2d 775 (Fla. Dist. Ct. App. 1988) 18

SUPREME COURT RULE

SUP. CT. R. 10(a) 12

FEDERAL STATUTE

FED. R. CIV. P. 24(a)(2) 19

STATE STATUTES

FLA. STAT. ANN. § 620.8307(1) (West 2005) 2

FLA. STAT. ANN. § 620.9901(2) (West 2005) 2, 17

ILL. REV. STAT. ch. 106 1/2 ¶ 9(3)(e) 18

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Sigmund Lefkovitz et al. respectfully request that this Court deny Petitioner's Petition for Writ of Certiorari, seeking review of the Seventh Circuit's opinion in this case. Petitioner Jarnis United Properties Co., a Florida general partnership, shall hereinafter be referred to as "Jarnis." The Seventh Circuit's opinion is reported at *Lefkovitz v. Wagner*, 395 F.3d 773 (7th Cir. 2005) and is reprinted in Jarnis' Appendix.

STATEMENT OF THE CASE

Petitioner Jarnis seeks review of an order of the Seventh Circuit affirming the district court's confirmation of an arbitration award. The underlying claims and counterclaims arose out of multiple disputes between the four majority partners who control Jarnis, and the two minority partners who do not.

Petitioner Jarnis is a Florida general partnership formed in 1990 by six individual partners or "Family Heads"[1] who together were engaged in the ownership, operation and development of real estate holdings since the late 1960s. (R.63-1, Ex. 3 at 3.) Each of the six Family Heads controlled a roughly one-sixth interest in Jarnis. (R.97, Ex. A.) Although nominal ownership of certain partnership interests in Jarnis were gifted over the years to family members and trusts for estate planning purposes, the four majority Family Heads (collectively, the

[1] (R.1, Ex. D § 1.14.)

"Controlling Partners") exercised complete managerial, operational and financial control over the enterprise, to the exclusion (and frequent consternation) of the two minority Family Heads, Sigmund and Irving Lefkovitz (the "Lefkovitzes"), who, together with the family interests that they control, are the Respondents herein. (R.63-1, Ex. 4; R.96-R.97; R.97, Ex. A, Ex. C at 4-5.)

The Lefkovitzes filed the action below against all four Controlling Partners. (R.1.) At the time the action was filed, Jarnis itself was not an entity that could sue or be sued under Florida law, and it was not named as a defendant.[2]

The district court ordered arbitration pursuant to the arbitration provision of the Jarnis Partnership Agreement (the "Jarnis Agreement") – a provision that the district court accurately described as "very broad." (Resp't App. 5a.) The Jarnis Agreement arbitration provision provided that "any dispute or controversy arising under, out of or in connection with this Agreement shall be determined by arbitration. . . ." (Resp't App. 11a § 13.11.) All six Family Heads, including the Controlling Partners, were before the arbitrator, and they collectively controlled 100% of the interests in Jarnis, including the passive interests that were nominally owned by various family members and trusts. (R.1, Ex. D §§ 1.14-1.15; R.97, Ex. A.) Although

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[2] Jarnis became subject to Florida's Revised Uniform Partnership Act on January 1, 1998, after the action had already commenced in the district court. FLA. STAT. ANN. § 620.9901(2) (West 2005). The Revised Uniform Partnership Act changed Florida law by providing that a partnership could sue and be sued in its own name. FLA. STAT. ANN. § 620.8307(1) (West 2005). However, upon becoming amenable to suit, Jarnis did not seek to intervene in the district court or in the subsequent arbitration. It sought intervention only after the arbitration award had been entered and confirmation proceedings were near their conclusion.

Jarnis was not formally named as a party to the arbitration, and did not seek to intervene in the arbitration, it nonetheless funded the Controlling Partners' defense of the action. (Resp't App. 14a-15a ¶ 2.)

The arbitrator found that the Controlling Partners had breached their fiduciary and other duties as managing partners of the enterprise by extracting excessive fees for their services from the Jarnis partnership and its related entities. (R.63-5, Ex. 45.) The award ordered the Controlling Partners to return approximately $7.25 million to Jarnis. (Resp't App. 22a-23a ¶¶ B-C.) In addition, the arbitrator, noting that the Controlling Partners had caused Jarnis to pay their own attorneys' fees throughout the proceedings, ordered Jarnis to likewise pay the Lefkovitzes' attorneys' fees of approximately $1.8 million. (Resp't App. 26a ¶ G.) Thus, under the arbitrator's award, Jarnis' partners obtained a net recovery of approximately $5.5 million.

As is obvious from both the Seventh Circuit and district court opinions, this case was determined on its unique facts. In holding that Jarnis was bound by the arbitrator's award, the Seventh Circuit neither rejected case law limiting an arbitrator's ability to bind nonparties to an award, nor otherwise created a conflict among the circuits, as Jarnis' Petition claims. Instead, like the district court and the arbitrator, the Seventh Circuit found that there was no practical difference between Jarnis and its Controlling Partners, and that the Controlling Partners had fully represented Jarnis' interests in the arbitration. (Jarnis Pet. App. 4a, 7a.) The Seventh Circuit also found that Jarnis was not negatively impacted by the arbitration award since there was no practical difference between the Controlling Partners paying the Lefkovitzes directly or having

the Controlling Partners pay Jarnis and then having Jarnis pay the Lefkovitzes. (*Id.*)

The decision below therefore creates no conflict between the circuit courts, nor does it raise issues of national importance. The issue presented below was not, as Jarnis claims, whether a nonparty may be bound by an arbitration award. The issue was the extent to which a general partnership may be bound in an action against the individual partners who manage and control the enterprise and who have fully represented its interests. That is an issue of state law, not federal law, and it implicates no important federal interest warranting this Court's review.

Likewise, no important federal question is presented by the district court's denial of Jarnis' motion to intervene, or the Seventh Circuit's affirmance of that ruling as a valid exercise of the district court's discretion. The Seventh Circuit held that Jarnis, through its Controlling Partners, engaged in gamesmanship in seeking intervention some six years after the litigation had commenced: "The only plausible motivation for Jarnis' arguing against its being included in the award is that the defendants, who control Jarnis, are trying to derail the arbitration because they are dissatisfied with its outcome." (Jarnis Pet. App. 7a.) That fact-specific ruling does not create a conflict with any other courts of appeal or tread on any issue of national importance. Accordingly, and as more fully demonstrated below, the Petition for Writ of Certiorari should be denied.

FACTUAL BACKGROUND

Since the late 1960s, the Lefkovitzes and the Controlling Partners owned and/or managed a real estate business concentrating on the development, ownership and leasing of various properties, primarily nursing homes. (R.63-1, Ex. 3 at 3.) On December 20, 1990, these six individuals, along with their respective family members and trusts to whom portions of the six individuals' interests had been assigned for estate planning purposes, entered into the Jarnis Agreement, which restructured the business and created the Petitioner, Jarnis. (R.1, Ex. D.) Each of the six individuals (the Lefkovitzes and the four Controlling Partners), together with the family interests they controlled, held, respectively, a roughly one-sixth interest in Jarnis. (R.97, Ex. A.) Jarnis, in turn, owns and manages its various properties through a complex array of affiliated Nevada corporations, Florida limited partnerships and single-purpose realty entities, all of which are fully controlled and operated by the Controlling Partners. (R.1, Ex. D, Ex. B thereto; R.63-1, Ex. 4; R.96-R.97; R.97, Ex. C at 4-5.)

Jarnis' ownership is structured around the six individual "Family Heads" and their "Family Units," which include:

> the Family Head, his spouse, mother, mother-in-law, father, father-in-law, brother, brother-in-law, sister, sister-in-law, uncle, aunt, nephew, niece, lineal descendant, spouse of any of the aforementioned relatives and those similarly related to said spouse, and all trustees, custodians, heirs, legatees, executors, administrators, other personal representatives, and other entities holding

> Partnership Interests in the Partnership for the benefit of any such Persons.

(R.1, Ex. D §§ 1.14-1.15.) The Controlling Partners and their respective Family Units hold a combined 67.67% interest in Jarnis, *i.e.*, approximately two-thirds. (R.97, Ex. A.) The Lefkovitzes and their respective Family Units own the remaining third. (*Id.*)

The Jarnis Agreement provides for arbitration of "any dispute or controversy arising under, out of or in connection with or in relation to" the Jarnis Agreement. (Resp't App. 11a § 13.11.) The same provision also vests the arbitrator with the authority to apportion attorneys' fees as part of his award. (*Id.*)

In October 1997, the Lefkovitzes and their respective Family Units sued the Controlling Partners and others in district court for the Controlling Partners' abuses in paying themselves millions of dollars in supposed "fees" from Jarnis and its related entities between 1991 and 1999, pursuant to purported "service agreements" that the Controlling Partners signed with Jarnis and its affiliated entities. (R.1.) The Controlling Partners, acting as a self-appointed (as well as self-dealing) "Executive Committee,"[3] approved these payments to themselves over the Lefkovitzes' objections. (R.63-2, Ex. 10.)

The Controlling Partners moved in the district court to compel arbitration based on the Jarnis Agreement's arbitration provision. (R.4-R.5.) When the Lefkovitzes opposed arbitration on the ground that some of the entities named in the lawsuit were not subject to the Jarnis Agreement's

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[3] (R.97, Ex. C at 4-5.)

arbitration provision, or any comparable arbitration provision, the Controlling Partners told the district court that:

> [f]inally, it is important to note that defendants at any time could cause the business defendants to enter into arbitration agreements with Jarnis, the Nevada Corporations, the FLP's [Florida limited partnerships] and the Realty Entities, requiring the arbitration of all disputes relating to services provided to the companies. ***As plaintiffs allege in their complaint, the individual defendants control Jarnis, the Nevada Corporations, the FLP's, and the Realty Entities, as well as the business defendants. Defendants believe that going through that formality is unnecessary, however, because the arbitration provisions in the Jarnis Agreement and the Shareholder Agreements plainly encompass plaintiffs' claims against the business defendants.***

(Resp't App. 42a (emphasis added).) On June 3, 1998, the district court granted defendants' motion and ordered the parties to arbitrate their dispute. (*Id.* at 1a-10a.) In particular, the district court found that the defendant Controlling Partners and Jarnis were "one and the same":

> [Plaintiffs] argue that these defendants had an independent duty to engage in their profession in good faith and not to violate the mutual trust which exists between these defendants and their clients. ***The problem with this argument is that the clients and these defendants are one and the same.*** These defendants [the Controlling Partners] were providing Jarnis, the Nevada Corporations, the FLP's, and the Realty Entities with accounting and legal services and at the same time, they were managing these entities.

> As managers of these entities, they were bound by the Jarnis [Agreement] and Shareholder Agreements and had certain fiduciary duties as a result of those agreements. This included the duty to provide their professional services without depleting the assets of the businesses entities.

(*Id.* at 7a-8a (emphasis added).)

The named parties to the arbitration included all six Family Heads, including the Controlling Partners, who had acknowledged their ultimate control of Jarnis to the district court. Accordingly, the arbitrator treated all the proceedings as "arising out of an ongoing dispute among the same six families who, with minor financial interests of third parties, own and control the assets which are the subject of this arbitration." (R.70-2, Ex. KK at 1.) As stated by the arbitrator, "we're talking about all the same guys, whether it's in the claim or the counterclaim. And ultimately money in one pocket may end up partly in another pocket, but it's all going to the same group of people." (R.70-2, Ex. LL at 40.)

The arbitrator's final award was the product of nearly four years of extensive evidentiary hearings, voluminous briefings and countless hours of oral argument. (*See* R.70-1, Ex. Q.) The evidentiary proceedings regarding the portion of the final award at issue here began in February 2001 and continued through September 2001. There were 14 witnesses and over 4,000 pages of hearing transcripts. (*See* R.70-1, Ex. C at 1.) During the entire proceedings, the arbitrator entered at least 11 detailed and well-reasoned interim substantive rulings and/or findings and directives in connection with the portion of the award at issue. (Resp't App. 22a; R.70-1, Ex. Q.) The arbitrator found that

the Controlling Partners violated the Jarnis Agreement and breached their fiduciary duties to the Lefkovitzes by utilizing their control of Jarnis and its related entities to siphon off millions of dollars under the guise of "service fees." (R.63-5, Ex. 45.) The March 5, 2003 final award required the Controlling Partners to repay to Jarnis approximately $7.25 million. (Resp't App. 22a-23a ¶¶ B-C.) Jarnis, in turn, was required to reimburse the Lefkovitzes approximately $1.9 million in legal fees. (*Id.* at 26a ¶ G.) Thus, on a net basis, the final award resulted in a recovery by Jarnis and its constituent partners of approximately $5.5 million.

District Court Confirmation Proceedings. The Lefkovitzes moved the district court to confirm the award on March 7, 2003. (R.37.) On July 14, 2003, the Controlling Partners filed a consolidated motion to vacate portions of the award. (R.62.) On August 22, 2003, the Lefkovitzes filed their response to defendants' consolidated motion. (R.69.) With briefing nearly complete and a ruling scheduled for October 10, 2003, (R.66), Jarnis, on September 3, 2003, nearly six years after the action was originally filed and six months after the confirmation proceedings had commenced, suddenly petitioned to intervene in the confirmation proceedings. (R.76-R.77.) Simultaneously with the filing of Jarnis' intervention motion, sixty Jarnis-affiliated entities, all controlled by the Controlling Partners, also petitioned to intervene in the district court confirmation proceedings, along with all the Controlling

Partners' family members and trusts who held passive general partnership interests.[4] (R.72-R.73; R.77.)

Jarnis' intervention motion raised the identical arguments already proffered by the Controlling Partners for vacatur of the award. (*Compare* R.80 *and* R.84, Ex. 12 at 30-32 *to* R.76 Mem.) Jarnis offered no new arguments or evidence and raised no factual or legal arguments that had not already been raised by the Controlling Partners. The district court confirmed the award in its entirety and denied all intervention motions as untimely. (Jarnis Pet. App. 16a n.1.) In particular, the court found, based on the arbitration record, that the Controlling Partners controlled Jarnis, (*id.*), and that Jarnis "could have intervened in the underlying arbitration," (*id.* at 23a).

Seventh Circuit Opinion. The Seventh Circuit, noting that "this case is special," (Jarnis Pet. App. 11a), affirmed the district court's decision in its entirety. The Seventh Circuit noted the Controlling Partners' prior admission of control to the district court in seeking to compel arbitration and held "parties that represent to the court that they have been authorized to control the entire litigation, as the defendants did here, cannot later repudiate their representation in an effort to obtain a favorable judgment; that would be a fraud on the court." (Jarnis Pet. App. 11a, 12a.) Consistent with the findings of the arbitrator, the

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[4] The affiliated entities and family members also were denied leave to intervene. (Jarnis Pet. App. 16a n.1.) Although these proposed intervenors originally appealed that ruling, they subsequently moved for voluntary dismissal of their appeal. (*See* May 14, 2004 Motion of Intervenors-Appellants for Leave to Voluntarily Dismiss Appeals No. 03-4175 and 03-4176.) Thus, Jarnis was the sole proposed intervenor-appellant below and is the sole Petitioner here.

Seventh Circuit found that Jarnis and the Controlling Partners essentially were one and the same, and observed that the award of attorneys' fees against Jarnis had "no practical significance; the award was no different from awarding two-thirds of the amount of it to the defendants . . . and the other third to the plaintiffs." (Jarnis Pet. App. 4a.) As recognized by the Seventh Circuit, Jarnis was merely used as a conduit to effectuate the award: "a judgment that Jarnis pay the plaintiffs $1.8 million [for legal fees] has exactly the same consequence as a judgment that the defendants pay them $1.2 million . . . because the defendants and their dependents own two-thirds of Jarnis." (Jarnis Pet. App. 7a.) Because the Seventh Circuit found that Jarnis had not been harmed by the award, since Jarnis netted some $5.5 million, the Seventh Circuit concluded that the "issue of the attorneys' fee award is therefore moot." (Jarnis Pet. App. 7a.)

The Seventh Circuit also confirmed the district court's discretionary denial of Jarnis' intervention motion, finding that the Controlling Partners were "trying to derail the arbitration because they are dissatisfied with its outcome." (*Id.*) In short, the Seventh Circuit rejected Jarnis' form-over-substance arguments and determined that, on the specific facts and circumstances of this case, there was no basis to vacate the arbitrator's award or to allow Jarnis to intervene.

REASONS FOR DENYING THE PETITION

THE RULING BELOW WAS DECIDED ON THE SPECIFIC FACTS OF THIS CASE AND DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON AN IMPORTANT FEDERAL QUESTION.

Issuance of a writ of certiorari is not a matter of right. A petition for a writ of certiorari will be granted only for compelling reasons such as "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923)); *Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (holding the principal purpose for which the Court grants certiorari "is to resolve conflicts among the United States Courts of Appeal and state courts concerning the meaning of provisions of federal law"). *See also* SUP. CT. R. 10(a). This Court consistently has held that "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Nothing in the Seventh Circuit's very fact-specific opinion below creates "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice,* 349 U.S. at 79. The interests of Jarnis were fully represented by the Controlling Partners below, and all six of the Family Heads – the real parties in interest – were all parties to the arbitration. Jarnis, whose partners netted recovery of some $5.5 million as a result of the arbitration, did not incur "substantial financial obligations,"

(Jarnis Pet. at 2), as a result of the arbitrator's rulings. Accordingly, the Seventh Circuit properly held that the arbitrator's award was fully binding and enforceable, notwithstanding the hyper-technicality that Jarnis – who had no standing to sue or be sued at the time the action below commenced – was not a formal party to the arbitration proceedings.

Likewise, the Seventh Circuit properly held that it was well within the district court's discretion to deny Jarnis' belated attempt to intervene in the proceedings six years after they began, at a time when substantive briefing on confirmation was nearly complete and a ruling date was imminent. It was apparent that the motion to intervene was engineered by the Controlling Partners themselves in an effort to thwart confirmation of an arbitration award with which they were displeased. It was these unique facts, not a rejection of established legal principles, that formed the basis of the opinion below.

A. The Fact-Specific Decision Below Affirming Confirmation Of The Arbitration Award Does Not Conflict With Existing Law.

Jarnis claims that the opinion below creates a conflict among the courts of appeal with respect to whether a nonparty to an arbitration proceeding can be bound by the outcome of the proceeding. However, none of the supposedly "conflicting" cases cited by Jarnis involve the situation presented here, namely, where the parties to the arbitration control the entity in question and where its interests have been fully and vigorously represented in the proceedings. Jarnis was not some independent stranger to the proceedings or an arm's-length third-party whose rights were compromised without fair notice or hearing.

The Controlling Partners consistently represented themselves to the court and to the arbitrator as the parties who fully controlled Jarnis and its affairs. They represented Jarnis' interests, Jarnis paid for their defense, and Jarnis was fully aware of the proceedings by virtue of the fact that its entire management were parties to the arbitration.

None of the cases cited by Jarnis announce some formalistic, unyielding rule prohibiting an arbitrator from awarding relief that affects a nonparty, regardless of facts or circumstances, regardless of whether the nonparty's rights are adversely affected, and regardless of whether the nonparty is fully controlled by (and for all intents and purposes identical to) the parties who have been named formally. (Jarnis Pet. at 7-8.) On the contrary, each case was decided only after a thorough review of the individual facts and circumstances presented, none of which are even remotely similar to the facts presented here.

Jarnis relies heavily on *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299 (2d Cir. 1963). There, however, the corporate third-party was neither "a party to the arbitration clause" nor covered by the court order compelling arbitration. *Id.* at 301. In fact, the parties had admitted "that the arbitrator exceeded his powers." *Id.* Although the court in *Orion* found on the facts presented that the arbitrator had exceeded his authority, the court specifically stated that if a corporate party to arbitration is found to be an alter ego of an unnamed corporate parent – a situation much closer to the instant case – the corporate parent can in fact be bound by the award. *Id.*

The other cases cited by Jarnis were similarly fact-driven. *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330

F.3d 843 (6th Cir. 2003), involved an attempt to bind third-party corporations where the court, prior to arbitration, had ruled that they were not subject to the arbitration agreement at issue. In *NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076 (6th Cir. 1995), the arbitrator exceeded his authority by awarding class-wide relief in a case that was not a class action, and by ordering that the defendant pay punitive damages to parties who were not covered by either the dealer agreement or the arbitration agreement at issue. *Pacific Reinsur. Mgmt. Corp. v. Ohio Reinsur. Corp.*, 935 F.2d 1019 (9th Cir. 1991), involved a third-party who was not covered by either the arbitration agreement or the court order compelling arbitration, and whose interests were in no way represented in the arbitration. *IBEW Local 265 v. O.K. Elec. Co.*, 793 F.2d 214 (8th Cir. 1986), held that third-party corporations could not be bound by an arbitration award between a union and another corporate party where the third-party corporations were not covered by the arbitration provision at issue, had no notice the arbitration was occurring, and were not even mentioned in the union grievance that initiated the arbitration.

Such cases have no application to the facts presented here, where (i) the so-called "third-party" is a general partnership, (ii) the arbitration provision at issue appears in the partnership agreement itself and applies to all disputes arising out of or relating to the affairs of the partnership, (iii) the parties to the arbitration owned or controlled all of the interests of the so-called "third-party" partnership, and (iv) the parties in control of the so-called "third-party" partnership fully represented its interests in the arbitration proceedings. The courts in similar circumstances have held that technical "nonparties" may indeed be bound by an arbitration award. *Dighello v. Busconi*, 673

F. Supp. 85, 89-90 (D. Conn. 1987), held that unnamed corporate entities were bound by an award where the arbitrator found that those entities directly benefited from the agreements at issue and were "clearly owned, dominated and controlled" by a party to the arbitration. That is precisely the case here. *See also Bruscianelli v. Triemstra*, No. 99 C 6446, 2000 WL 1100439, at *4 (N.D. Ill. Aug. 4, 2000) (confirming award and rejecting claims that the award should be vacated because it binds a nonparty who failed to intervene); *Maul v. Aznavoorian*, No. C 96-2965 TEH, 1997 WL 16313, at *3 (N.D. Cal. Jan. 9, 1997) (rejecting argument that the arbitration award was beyond the arbitration panel's authority where rights of nonparties were involved); *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, No. 92 CIV. 7916 (SWK), 1993 WL 362391, at *7-*9 (S.D.N.Y. Sept. 14, 1993) (stating that "under certain circumstances . . . a court may enforce an award against a non-party" and modifying the award to hold nonparty corporation jointly and severally liable for amount awarded).

On the facts presented here, the arbitrator found that the disputes essentially involved the six Family Heads, and that there was no practical distinction between the parties named in the arbitration, in particular the Controlling Partners, and Jarnis. Both the district court and the Seventh Circuit agreed. *See Dighello*, 673 F. Supp. at 89-90 n.1 (unnamed parties bound by arbitration award where arbitrators find they are "acting by and through" named party to arbitration). (*See also* Jarnis Pet. App. 4a ("no practical significance" to the Controlling Partners paying award to Jarnis or to the Lefkovitzes), *id.* 7a (whether attorneys' fees are paid by Jarnis or the Controlling Partners directly has "exactly the same consequence");

Resp't App. 8a (Jarnis and Controlling Partners "are one and the same").) Jarnis' interests were therefore fully represented in the arbitration. (*See* R.70-2, Ex. KK at 1 (arbitrator treating all proceedings under the award as "arising out of an ongoing dispute among the same six families, who, with minor financial interests of third parties, own and control the assets which are the subject of this arbitration"); *see also* R.70-2, Ex. LL at 40 (arbitrator recognizing no practical distinction as the Seventh Circuit held below by concluding that "we're really talking about all the same guys. . . . And ultimately money in one pocket may end up partly in another pocket, but it's all going to the same group of people"); R.63-4, Ex. 38 ¶ A.2 (arbitrator acknowledging Controlling Partners' control, stating "[t]here appears to be no instance . . . in which the said four [individual defendants] voted other than uniformly on any matter which is alleged to have resulted in a benefit to one or more of them. This places the four in essentially the same position as a managing partner who is able to wield control without the weight of opposition").) None of the cases cited by Jarnis involve a situation that is even remotely similar.

In addition, each of the cases on which Jarnis relies involved corporations or other parties that had standing to sue or be sued. Jarnis, however, is a general partnership, not a corporation, and at the time the action below was commenced Jarnis was not an entity that could sue or be sued in its own name. The underlying action was filed in 1997, when Jarnis was still governed by the Florida Uniform Partnership Act ("FUPA"). *See also* FLA. STAT. ANN. § 620.9901(2) (West 2005). (*See* R.1, Ex. D §§ 1.01, 2.01.) The FUPA is silent on whether a partnership is an entity that can sue and be sued, and Florida common law

therefore applies. *See Asociacion De Perjudicados Por Inversiones Efectuadas En U.S.A. v. Citibank, F.S.B.*, 770 So. 2d 1267, 1269 (Fla. Dist. Ct. App. 2000) (finding that where there is no statutory authority conferring the capacity to sue or be sued, then the common law rule applies). Under Florida common law, a partnership was not considered a legal entity and, as such, could neither sue nor be sued. *Fidelity & Cas. Co. of N.Y. v. Homan*, 116 So. 2d 444, 447 (Fla. Dist. Ct. App. 1959) ("an action against partners amounts to a suit against each of them as individuals as well as in the capacity of partners"). So, at the time this action was filed, as a matter of Florida law, the Lefkovitzes could sue only individual partners of Jarnis and not Jarnis itself.[5]

A similar situation was presented in *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264 (7th Cir. 1988), where the court confirmed an arbitration award that imposed liability on a partnership, rejecting the partners' contention that the arbitrator exceeded his authority by determining partnership liability without the consent of all partners of the partnership. While *Ellis* involved Illinois law, the Illinois statute analyzed, ILL. REV. STAT. ch. 106 1/2 ¶ 9(3)(e), is identical to the comparable FUPA provision that governed Jarnis and is thus equally applicable to the case at hand.

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[5] Contrary to Jarnis' representation, (Jarnis Pet. at 12), Florida common law requires only that ***at least one*** general partner be named in the action to obtain a judgment against partnership assets. *Louis Benito Adver., Inc. v. Brown*, 517 So. 2d 775, 776 (Fla. Dist. Ct. App. 1988) (finding it unnecessary to name all partners as defendants in suit against partnership when plaintiff was only seeking to enforce judgment against partnership assets).

In any event, whether and to what extent a court can enforce against a partnership a judgment entered in an action against individual partners is quintessentially a question of state law. It involves no overriding federal issue, and no issue of national importance. It is not a question on which a writ of certiorari should issue.

B. Jarnis Cites To No Conflict Of Decision Or Principle Of Public Importance To Warrant Review Of The Denial Of Jarnis' Motion For Intervention, And Jarnis' Intervention Motion Was Properly Denied In Any Event.

The court of appeals' disposition of Jarnis' motion to intervene does not rise to the level of significance required by this Court for review. Jarnis does not argue that the Seventh Circuit's decision to affirm the district court's denial of Jarnis' motion to intervene is compelling enough to justify this Court's review. Jarnis does not cite to any circuit court split, or raise any issue the settlement of which is a matter of public importance. Instead, Jarnis repeats the merits arguments rejected below and asserts that the rulings below conflict with the plain terms of FED. R. CIV. P. 24(a)(2) (hereinafter "Rule 24(a)(2)"). Mere re-argument of the matters below, however, is not a sufficient basis on which Jarnis can obtain the extraordinary relief of a writ of certiorari. *See Rice*, 349 U.S. at 79 (refusing to address the merits where petition failed to meet the review standard of this Court – there were no issues of public importance or circuit split regarding federal law).

In any event, the ruling below was correct. The district court properly found, and the Seventh Circuit properly affirmed, that (1) Jarnis' motion was untimely, since Jarnis "could have intervened in the underlying

arbitration" (Jarnis Pet. App. 16a n.1, 23a), and (2) Jarnis' interests were adequately represented, since the Controlling Partners were parties to the action and had interests identical to Jarnis. (Jarnis Pet. App. 7a, 11a-12a, 16a n.1, 23a-24a.) Even if Jarnis' merits arguments regarding intervention were properly raised in a petition for writ of certiorari, nothing in the decisions below departs from well-established discretionary application of Rule 24(a)(2).

1. Timely Application.

Jarnis contends its intervention motion was timely because it was made six months after this case was reinstated by the district court. Jarnis, however, ignores that the confirmation proceedings were nearly concluded at the time its 11th-hour intervention motion was filed. Jarnis also ignores the six years of arbitration/litigation that preceded its intervention motion. Jarnis could have intervened at any point, if the Controlling Partners thought that such intervention was necessary or advisable. The entire arbitration focused on the Controlling Partners' abuses of their control of Jarnis.

As such, Jarnis was on notice as soon as the complaint in this matter was filed that Jarnis' interests might be implicated. Jarnis does not and cannot claim to have been unaware of the underlying proceedings. Jarnis' six-year delay cannot be justified under any circumstances, and dismissal of its intervention motion as untimely was well within the district court's discretion. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973) (upholding the district court's finding that a motion to intervene four months after a suit was commenced was untimely); *Shea v. Angulo*, 19 F.3d 343, 349 (7th Cir. 1994) (noting that the district court

could have found the motion to intervene untimely when it was filed more than a year after the suit was first filed); *Schultz v. Connery*, 863 F.2d 551, 555 (7th Cir. 1988) (finding that although the plaintiff would not be prejudiced by the intervention, denial of the motion to intervene still was warranted where it was filed over three years after the action).

Jarnis' argument borders on the absurd when it claims that it did not intervene in the arbitration because it would have been forced to litigate in front of an arbitrator that it did not participate in selecting. It is axiomatic that an intervenor has no choice in the selection of its adjudicator because an intervenor seeks to join an action that already has commenced. Moreover, the Controlling Partners and the Lefkovitzes had fully participated in the selection of the arbitrator. Jarnis hardly can claim that its interests were not adequately represented in the selection process by the Controlling Partners, or that the outcome of the selection process would have been different had Jarnis' name appeared in the caption.

2. Adequate Representation.

Both Jarnis and the Controlling Partners sought to do the same thing – vacate the section of the final award related to Proceeding 3 on the basis that the arbitrator exceeded his authority by binding nonparties. Jarnis cannot in good faith allege that its interests were not adequately represented by the defendant Controlling Partners. Not only did the Controlling Partners and Jarnis seek the same result, but they raised the ***identical*** arguments for vacation of the award. (*Compare* R.80 and R.84, Ex. 12 at 30-32 *to* R.76 Mem.) Accordingly, intervention

properly was denied. *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 205 (7th Cir. 1982) (denying intervention where the interests of the proposed intervenor and the defendant were identical).

Jarnis claims that it cannot be bound by the Controlling Partners' admissions that they control Jarnis on the ground that Jarnis is an "independent" entity with the capacity to represent its own interests in legal proceedings. (Jarnis Pet. at 19.) Of course, the Controlling Partners' admissions to the district court were not the sole basis for the arbitrator's determination of control. Moreover, under the law in effect at the time this action was initiated, a partnership was not considered a legal entity and thus it could not sue or be sued in the partnership name, as Jarnis incorrectly alleged. *See Fidelity*, 116 So. 2d at 447.

Above all, Jarnis' argument proves too much: if Jarnis claims that it was "independent" and had the capacity to represent its own interests, then why did it not intervene in the arbitration? It was not for ignorance, as Jarnis was paying the Controlling Partners' legal fees and was fully aware of the proceedings; nor was it because Jarnis was dissatisfied with the representation being provided by the Controlling Partners, as it ultimately presented exactly the same arguments in virtually the same words as had been presented by the Controlling Partners. The only reason that Jarnis did not intervene in the arbitration is that it believed its interests were adequately represented by its Controlling Partners and it chose not to do so.

In sum, the record below amply demonstrates that the defendant Controlling Partners completely controlled Jarnis' affairs and utilized Jarnis as their own instrumentality to

enrich themselves at the Lefkovitzes' expense. The Controlling Partners also were the motivating force behind Jarnis' decision not to intervene in the arbitration, its 11th-hour attempt to intervene in (and attempt to derail) the confirmation proceedings, and its appeal to the Seventh Circuit. The Controlling Partners likewise are the motivating force behind Jarnis' Petition for a Writ of Certiorari here, where they have the temerity to suggest that Jarnis is somehow "independent" of its Controlling Partners, as though they have little influence and even less power over its affairs. The arbitrator, a distinguished district judge and an eminent panel of the Seventh Circuit all have found otherwise, and Jarnis' protestations to the contrary, however bold or innovative they may be, simply do not give rise to any issue worthy of this Court's review.

CONCLUSION

The Petition for a Writ of Certiorari should be denied in all respects.

Respectfully submitted,

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June 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIGMUND LEFKOVITZ, et al.,	)	
Plaintiffs,	)	
v.	)	
NATHAN WAGNER, SUSAN WAGNER, WAGNER ASSOCIATES, ROBERT U. GOLDMAN, ROBERT U. GOLDMAN, LTD., JAY FELNER, ALBERT SCHWARTZBERG, NCIS CORP. and NEW CENTURY INVESTORS SERVICES, INC.,	)	**No. 97 C 7555**
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The plaintiffs filed a fourteen count complaint against the defendants alleging racketeering, conspiracy, breach of contract, breach of the implied duty of good faith and fair dealing, breach of fiduciary duty, constructive fraud, fraudulent concealment, and conversion. The defendants move to compel arbitration and to stay these proceedings under the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 3, 4. For the reasons set forth below, the defendants' motions to compel arbitration and to stay these proceedings pending the conclusion of arbitration are granted.

Background

According to the complaint, in 1968, Sigmund and Irving Lefkovitz, Nathan Wagner, Jay Felner, and Albert Schwartzberg formed a company called DiCom Corporation ("DiCom"). DiCom was engaged in the general contracting

and real estate development business. As part of that business, numerous limited partnerships were formed for the purpose of holding real property, personalty, contract rights, and other investments related to the business ("Realty Entities"). The plaintiffs, Mr. Wagner, Susan Wagner, Robert U. Goldman, Mr. Felner, and Mr. Schwartzberg ("individual defendants") held interests in those partnerships.

In approximately 1990, Sigmund and Irving Lefkovitz, Mr. Wagner, Mr. Goldman, Mr. Felner, and Mr. Schwartzberg allegedly agreed to reorganize and restructure their business holdings to centralize the management and operations of the partnerships and their related investments and businesses. The reorganization formed (1) five Nevada corporations ("Nevada Corporations"), (2) twenty-five Florida limited partnerships ("FLP's") with one of the five Nevada Corporations as the general partner, and (3) Jarnis United Properties Co. ("Jarnis"), a Florida general partnership. By 1995, Jarnis and the Nevada Corporations owned 100% of the FLP's which in turn owned 100% of the plaintiffs' and individual defendants' interests in the Realty Entities. The plaintiffs and the individual defendants are shareholders, officers, or directors of the Nevada Corporations and are partners in Jarnis.

Jarnis was formed and is managed pursuant to the General Partnership Agreement of Jarnis United Properties Company ("Jarnis Agreement"). The FLP's are governed by the Florida Limited Partnership Agreements which provide that the general partner is to make all determinations relating to the partnership. In addition, the general partner must get the approval of the limited partners, *i.e.*, Jarnis, to conduct certain businesses such as contracting for services. The Nevada Corporations are

governed by their corporate bylaws and shareholder agreements ("Shareholder Agreements"). The Jarnis Agreement and the Shareholder Agreements have arbitration clauses. § 13.11 of the Jarnis Agreement and § 17 of the Shareholder Agreements provide that "any dispute or controversy arising under, out of or in connection with or in relation to this Agreement shall be determined by arbitration."

The plaintiffs allege a scheme to defraud by the defendants. They allege that the defendants used their control of Jarnis, the Nevada Corporations, the FLP's, and the Realty Entities to charge excessive fees for services provided to those entities and to improperly allocate the liabilities and assets of these entities for their benefit. They claim that the defendants fraudulently identified the nature and purpose of payments to themselves for purposes of tax calculations. Sigmund Lefkovitz alleges that Mr. and Ms. Wagner and Wagner Associates misappropriated his share of the proceeds from the sale of the operations of the Kings Harbor Health Care Center in violation of § 3.06 of the Jarnis Agreement. Finally, the plaintiffs allege that the defendants concealed their wrongdoing by limiting plaintiffs' access to information regarding Jarnis, the Nevada Corporations, the FLP's, and the Realty Entities.

Motion to Compel Arbitration

An agreement to arbitrate is enforceable by a federal court. 9 U.S.C. § 2. The court must compel arbitration if it determines that the parties have a valid agreement to arbitrate and that the dispute is covered by the arbitration agreement. 9 U.S.C. § 4. None of the parties contest that

the arbitration provisions in the Jarnis Agreement and the Shareholder Agreements are valid. Rather, they differ on whether all the parties are bound by those agreements and whether the claims alleged in the complaint fall within the scope of the arbitration provisions.

A. Signatories to the Arbitration Agreements

Wagner Associates, Robert U. Goldman, Ltd. ("Goldman Ltd."), NCIS Corporation ("NCIS"), and New Century Investors Services, Inc. ("New Century") (collectively "business defendants") are not signatories to either the Jarnis Agreement or the Shareholder Agreements. The Seventh Circuit has held that nonsignatories cannot compel a signatory to arbitrate with them. *IDS Life Ins. Co. v. Sunamerica, Inc.*, 103 F.3d 524, 529 (7th Cir. 1996). It reasoned that under the language of the FAA, there must be an agreement in writing between the parties to arbitrate before one party can compel the other party to arbitrate. *Id.*

Even if the business defendants are not signatories to either the Jarnis Agreement or the Shareholder Agreements, they can still compel the plaintiffs to arbitrate if they are third party beneficiaries of those agreements or are agents of the signatories. *Id.; Messing v. Rosenkrantz*, 872 F. Supp. 539, 541 (N.D. Ill. 1995). In their complaint, the plaintiffs allege that

> [t]hrough . . . NCIS, New Century, . . . Wagner Associates and Robert U. Goldman, LTD, defendants Nathan and Susan Wagner, Goldman, Felner and Schwartzberg control the operations, including the checkbooks, journals, receipts, disbursements, distributions, payment of fees, payments of advances, and distribution of liabilities

> of the Realty Entities, Jarnis, the FLP's and the Nevada Corporations. They have used this control to defraud the plaintiffs and the partnerships. . . .

(Compl. ¶ 29). Essentially, the plaintiffs admit that the business defendants are agents of the individual defendants and that through them, the individual defendants controlled Jarnis, the Nevada Corporations, the Realty Entities, and the FLP's. Thus, as agents of signatories, they can compel the plaintiffs to arbitrate.

B. Scope of the Arbitration Provisions

The arbitration provisions in the Jarnis Agreement and the Shareholder Agreements are very broad, demanding arbitration for all claims that "arise under, out of or in connection with or in relation to" the agreements. There is "a strong federal policy favoring arbitration as a means of dispute resolution." *Morrie Mages & Shirlee Mages Found. v. Thrifty Corp.*, 916 F.2d 402, 405 (7th Cir. 1990). Thus any doubts or ambiguities about the arbitrability of a claim should be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

The plaintiffs concede that Counts III, X, and XI are arbitrable and those claims are in fact arbitrable because they allege breaches of Article VI and § 3.06 of the Jarnis Agreement. Furthermore, Count IV is also arbitrable as it alleges breach of the covenant of good faith and fair dealing in the Jarnis Agreement.

As for the remaining counts, the plaintiffs argue that they are not governed by the arbitration provisions because they stem from fraudulent activities involving not

only Jarnis and the Nevada Corporations, but also the Realty Entities and the FLP's. The plaintiffs claim that the Realty Entities and the FLP's are governed by different partnership agreements. Thus, if the defendants charged excessive fees, misallocated assets, or failed to disclose information, it is in violation of those partnership agreements.

The plaintiffs, however, have admitted that the defendants conduct *vis a vis* the Realty Entities and the FLP's was covered by the Jarnis Agreement. For example, in Count III, the plaintiffs allege that the defendants "willfully breached the Jarnis Agreement by intentionally charging unreasonable and excessive fees to Jarnis, the Realty Entities, the FLP's and the Nevada Corporations for services provided." (Compl. ¶ 63). Similarly, in Count IV, the plaintiffs state that the defendants breached the implied covenant of good faith and fair dealing in the Jarnis Agreement "by arbitrarily, capriciously and intentionally charging fees for services they provided to Jarnis, the Realty Entities, FLP's, and Nevada Corporations." (Compl. ¶ 69).[1] Furthermore, Jarnis and the Nevada

[1] Even if these admissions are not dispositive as to whether the claims relating to the Realty Entities and the FLP's are subject to arbitration under the Jarnis and Shareholder Agreements, the plaintiffs would be equitably estopped from denying that these claims are arbitrable. The plaintiffs cannot claim that the defendants breached the Jarnis Agreement by charging excessive fees to the Realty Entities and the FLP's and then deny that the Realty Entities and the FLP's are covered by the Jarnis Agreement for arbitration purposes. *See Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 838-39 (7th Cir.1981) (finding that it would be manifestly inequitable to permit a party to claim that its opponent failed to perform a contractual duty and at the same time deny that the opponent is a party to the contract with an arbitration provision).

Corporations own 100% of FLP's which in turn owns 100% of the plaintiffs and individual defendants' interests in the Realty Entities. The FLP's and the Realty Entities are controlled by Jarnis and the Nevada Corporations. The plaintiffs admit that "[t]he Realty Entities, Jarnis, the FLP's and the Nevada Corporations are in essence the same entities." (Compl. ¶¶ 33, 34). Finally, § 6.01 of the Jarnis Agreement provides that the partners have the right to engage the services of any partner or affiliate for management and other services including "all services related to the acquisition and development of Property; . . . arranging the sale, exchange or lease of Property; [and] Property management." "Property" is defined as "any one or all of the businesses, properties and assets owned directly or indirectly, through another partnership or partnerships or otherwise, by the Partnership." (Janis Agreement § 1.33). Given these facts and the presumption favoring arbitration, the claims relating to the FLP's and the Realty Entities arise under the Jarnis Agreement as well as relate to the Jarnis and Shareholder Agreements and are arbitrable.

The plaintiffs make two alternative arguments against arbitration. First, they contend that Counts VII to IX and XII to XIV arise from the professional responsibilities of Mr. and Ms. Wagner, Wagner Associates, Mr. Goldman and Goldman Ltd.[2] They argue that these defendants

[2] Counts VII to IX allege that Mr. and Ms. Wagner and Wagner Associates breached their fiduciary duty as accountants, that their actions constituted constructive fraud, and that they engaged in fraudulent concealment. Mr. Wagner is the principal of Wagner Associates and Ms. Wagner is an accountant. Counts XII to XIV allege that Mr. Goldman and Goldman Ltd. breached their fiduciary duties as

(Continued on following page)

had an independent duty to engage in their profession in good faith and not to violate the mutual trust which exists between these defendants and their clients. The problem with this argument is that the clients and these defendants are one and the same. These defendants were providing Jarnis, the Nevada Corporations, the FLP's, and the Realty Entities with accounting and legal services and at the same time, they were managing these entities. As managers of these entities, they were bound by the Jarnis and Shareholder Agreements and had certain fiduciary duties as a result of those agreements. This included the duty to provide their professional services without depleting the assets of the businesses entities. Thus, the claims for breach of professional duties are not independent of these defendants' duties under the Jarnis Agreement and Shareholder Agreements.

Additionally, the plaintiffs argue that Counts I, II, V, and VI, allege fraud, misallocation of tax liabilities, and fraudulent concealment and are not covered by the Jarnis Agreement or the Shareholder Agreements. The plaintiffs' allegations, however, demonstrate that each of these counts arise out of or relate to either the Jarnis Agreement or the Shareholder Agreements. Count I alleges a scheme to defraud based on the defendants' ability to control Jarnis, the Nevada Corporations, the FLP's, and the Realty Entities. As noted above, this control arises out of or relates to the Jarnis and the Shareholder Agreements. Count II alleges derogation of the defendants' duties under the partnership agreements. Count V and Count VI allege that Mr. Wagner, Mr. Felner, Mr. Goldman, and Mr.

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lawyers, that their actions constituted constructive fraud, and that they engaged in fraudulent concealment.

Schwartzberg breached their fiduciary duty as partners and that the breach constituted constructive fraud. Thus, these counts are all subject to arbitration.

Motion to Stay Proceedings

9 U.S.C. § 3 provides that "upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall . . . stay the trial [until the conclusion of arbitration]." All counts of the complaint are arbitrable and are therefore stayed pending the conclusion of arbitration.

Conclusion

The defendants' motion to compel arbitration is granted. These proceedings are stayed pending the conclusion of arbitration.

ENTER ORDER:

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: June 3, 1998

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GENERAL PARTNERSHIP AGREEMENT

OF

JARNIS UNITED PROPERTIES CO.

dated as of

December 20, 1990

* * *

13.11 Arbitration. Except as herein otherwise expressly provided, any dispute or controversy arising under, out of or in connection with or in relation to this Agreement shall be determined by arbitration in the City of Chicago pursuant to the rules of the American Arbitration Association then in effect and shall be final and binding on all parties thereto. Judgment thereon may be entered in any court of competent jurisdiction. The costs of such arbitration including all charges of the American Arbitration Association, disbursements and attorneys' fees incurred by all parties shall be paid and borne by the parties in the manner and in such amounts as determined by the arbitrator as part of his award.

13.12 Further Documents. Each of the partners, for themselves, their heirs, executors, administrators, personal representatives, successors and assigns, hereby covenants and agrees that he or she shall from time to time and at such time as may be required, execute such further agreements, supplemental agreements, assurances of title, and other documents and instruments as may be reasonably required and necessary to carry out partnership business or to effectuate the provisions hereof.

13.13 Descriptive Headings. The table of contents and the headings of the articles and sections of this Agreement are inserted for convenience only, shall not be

deemed to be a part of this Agreement and in no way define, limit, extend, or describe the scope or intent of any provisions hereof.

* * *

IN ARBITRATION BEFORE THE
AMERICAN ARBITRATION ASSOCIATION
CHICAGO, ILLINOIS

ALBERT SCHWARTZBERG, Claimant, IRVING LEFKOVITZ, and SIGMUND LEFKOVITZ, Respondents.	No. 51-180-00202 98 (Proceeding I)
29-31 ASSOCIATES, Claimant, NEW ROCHELLE NURSING HOME, IRVING LEFKOVITZ, and SIGMUND LEFKOVITZ, Respondents.	(Proceeding 2)
SIGMUND LEFKOVITZ, *et al.* Claimants, NATHAN WAGNER, *et al.* Respondents.	(Proceeding 3)

POST PHASE II RULINGS BY ARBITRATOR ON CERTAIN SUBSEQUENT ISSUES

I, the undersigned Arbitrator, having considered certain of the submissions and outgrowths in the wake of my January 24, 2002 Findings and Directives, do hereby issue the following determinations:

1. Pursuant to my January 24 Findings and Directives with respect to the appointment of a certified public

accountant, and in recognition of the failed undertakings by the parties to make a selection of such person or entity, I hereby select audit accountant Howard I. Blumstein and forensic accountant Susan L. Henry, and such other representatives of the firm of BDO Seidman, LLP as they deem necessary, to fulfill the requirements of the relevant portions of my January 24, 2002 Findings and Directives, as modified and supplemented by the parties, their representatives and the accountants in ongoing deliberations. The foregoing accountants will be compensated by Jarnis United Properties Co., a general partnership whose principal office is located at 600 Central Avenue, Highland Park, Illinois. A compensation agreement, upon approval by me, shall be executed forthwith by an authorized representative of the Jarnis partnership.

2. With respect Section B(5) of the January 24 Findings and Directives, that Ruling contemplates that Claimants and Respondents each bear their own legal fees and related costs arising out of the Phase II arbitration. It now appears that Messrs. Schwartzberg, Wagner, Goldman and Felner have been reimbursed by Jarnis for such fees and costs. If, in fact, this is the case, I direct that the Jarnis partnership pay the approved legal fees and costs of Claimants. In this regard, Claimants' attorneys shall first submit to me all fee and disbursement statements for the relevant period. Respondents may, should they deem it in their interest, submit to me their attorneys' statements for the relevant period as an aid in my determination of appropriate and fair fees and costs of Claimants' attorneys. Should there be material in either such statements which, while relevant to legal work for the Phase II proceedings, is of a confidential nature making it inappropriate for me to

view, the same may be blacked out as to substance, though the charge therefor should remain open.

3. I will rule on the remaining issues in due course.

/s/ Robert M. Grossman
Robert M. Grossman, Arbitrator

Date: April 19, 2002

IN ARBITRATION BEFORE THE
AMERICAN ARBITRATION ASSOCIATION
CHICAGO, ILLINOIS

ALBERT SCHWARTZBERG, Claimant, IRVING LEFKOVITZ and SIGMUND LEFKOVITZ Respondents.	No. 51-180-00202 98 (Proceeding 1)
29-31 ASSOCIATES, Claimant, NEW ROCHELLE NURSING HOME, IRVING LEFKOVITZ, and SIGMUND LEFKOVITZ, Respondents.	(Consolidated – Proceeding 2)
SIGMUND LEFKOVITZ, et al., Claimants, NATHAN WAGNER, et al. Respondents.	(Consolidated – Proceeding 3)

FINAL AWARD ON ALL DISPUTES OTHER THAN CIVIL CONTEMPT

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the parties in the Jarnis Agreement, section 13.11;, dated December 20, 1990, the New Rochelle Partnership Agreement, section 15, dated September 4,

1968, and the agreement of the parties, and having been duly sworn and having duly heard the proofs and allegations of the parties in these consolidated proceedings, hereby AWARD as follows:

Proceeding 1.

The (a) November 22, 1999 Rulings by Arbitrator as to Liability Re Claimant's Claims and Respondents' Counterclaims with Respect thereto; (b) March 23, 2000 Rulings by Arbitrator as to the Requests by Albert Schwartzberg and 29-31 Associates for Reconsideration and Clarification of, and Additional Rulings Based on November 22, 1999 Rulings; (c) June 26, 2000 Stipulation on Certain New Rochelle Nursing Home-Related Claims and Counterclaims and Other Stipulations and Agreements of the Parties; (d) October 31, 2000 Rulings by Arbitrator As To Damages Arising From Phase I(A) Determinations; (e) January 24, 2002 Findings and Directives of the Arbitrator; (f) June 24, 2002 Post Phase 11 Ruling Re: Albert Schwartzberg Commission, and (g) August 8, 2002 Rulings by Arbitrator re Compensation and Punitive Damage Issues are hereby incorporated by reference.

A. The Lefkovitzes are liable to New Rochelle Nursing Home partnership ("NRNH") for $53,451.97, plus $6,000 representing prejudgment interest. Subsequent to my interim ruling on this issue, these amounts have been paid by the Lefkovitzes to NRNH.

B. For the reasons set forth in Paragraph C of the October 31, 2000 Rulings by Arbitrator as to Damages Arising From Phase I(A) Determinations,

1. Irving Lefkovitz shall repay to NRNH $75,000, and

2. Sigmund Lefkovitz shall repay to NRNH $50,000.

Subsequent to my interim ruling on these issues, all the amounts listed in this Paragraph B have been paid to NRNH by Irving and Sigmund Lefkovitz, respectively.

C. For the reasons set forth in Paragraph A of the January 24, 2002 Findings and Directives of the Arbitrator,

1. Irving and Sigmund Lefkovitz are liable under the RICO statute for $106,903.94 in net treble damages to be paid to NRNH. Subsequent to my interim ruling on this issue, these amounts have been paid by the Lefkovitzes to NRNH;

2. As a result of my finding that they are in civil contempt of court, which is the subject of a separate award, and in violation of the RICO statute, Irving and Sigmund Lefkovitz are liable for $50,000 in legal fees and costs incurred by or on behalf of Albert Schwartzberg. Subsequent to my interim ruling on this issue, these amounts have been paid by the Lefkovitzes to Grippo & Elden, as counsel for Mr. Schwartzberg;

3. Irving Lefkovitz is to pay to NRNH punitive damages in the amount of $80,000. Subsequent to my interim ruling on this issue, this amount was paid by Irving Lefkovitz to NRNH;

4. Sigmund Lefkovitz is to pay to NRNH punitive damages in the amount of $70,000. Subsequent to my interim ruling on this issue, this amount was paid by Sigmund Lefkovitz to NRNH;

5. Albert Schwartzberg is to pay to NRNH punitive damages in the amount of $25,000. Subsequent to my interim ruling on this issue, this amount was paid by Albert Schwartzberg to NRNH;

6. Pursuant to my August 8, 2002 Rulings, NRNH is to pay the amounts paid by Irving Lefkovitz, Sigmund Lefkovitz and Albert Schwartzberg in paragraphs C(3)-C(5) above to 501(c)(3) charitable organizations as follows: $25,000 to one or more organizations selected by Irving and Sigmund Lefkovitz and $150,000 to one or more organizations selected by Mr. Schwartzberg.

D. All other claims and counterclaims in Proceeding 1 of this Arbitration are denied.

E. Except as provided in Section C.2 above, Albert Schwartzberg and Irving and Sigmund Lefkovitz shall bear attorney's fees and costs as each has previously incurred or paid them with respect to Proceeding 1,

F. For the reasons set forth in the June 24, 2002 Rulings of the Arbitrator, Albert Schwartzberg is entitled to retain he brokerage commission paid to him relating to the New Rochelle Nursing Home property exchange. The claims asserted by Irving and Sigmund Lefkovitz relating thereto are denied.

Proceeding 2.

A. The (a) November 22, 1999 Rulings by Arbitrator as to Liability Re Claimant's Claims and Respondents' Counterclaims with Respect thereto; (b) March 23, 2000 Rulings by Arbitrator as to the Requests by Albert Schwartzberg and 29-31 Associates for Reconsideration and Clarification of, and Additional Rulings Based on November 22, 1999 Rulings; (c) June 26, 2000 Stipulation

on Certain New Rochelle Nursing Home-Related Claims and Counterclaims and Other Stipulations and Agreements of the Parties; (d) October 31, 2000 Rulings by Arbitrator As To Damages Arising From Phase I(A) Determinations are hereby incorporated by reference.

B. NRNH is liable to 29-31 Associates for unpaid basic rent and unpaid overage rent under the Lease and unpaid forbearance fees under the Forbearance Agreement, plus prejudgment interest, in the following amounts:

1. *Unpaid basic rent.* 29-31 Associates has incurred damages of $42,000 in unpaid basic rent, plus prejudgment interest of $32,000 through April 30, 2000.

2. *Unpaid overage rent.* 29-31 Associates has incurred damages of $4,686,000 in unpaid overage rent for the period 12/20/91 through 12/31/97, plus prejudgment interest of $983,000 through April 30, 2000.

3. *Unpaid forbearance fees.* 29-31 Associates has incurred damages of $300,000 in unpaid forbearance fees, plus prejudgment interest of $242,000 through April 30, 2000.

4. *Use and occupancy charges.* The Lease having expired on December 31, 1997, 29-31 Associates has incurred damages of $195,000 in use and occupancy charges for the period 1/1/98 through 3/26/98, plus prejudgment interest of $39,000 through April 30, 2000.

5. *Accrual of Interest.* Interest shall accrue at 9% per annum on damages due to 29-31 Associations listed in this Section B until such damage amounts are paid to 29-31 Associates.

C. In the June 26, 2000 Stipulation, referenced in Paragraph A above, the parties agreed that the damage amounts relating to unpaid basic rent, interest on unpaid basic rent, unpaid overage rent, interest on unpaid overage rent, and unpaid forbearance fees, identified in Paragraph B, shall be satisfied solely from the assets of NRNH. Such assets of NRNH shall include, but not be limited to, cash deposits, securities, and other financial instruments currently held by NRNH at Northern Trust Bank and/or Northern Trust Securities, Inc., and interest earnings due and to become due thereon. Under no circumstances shall the general partners of NRNH *i.e.*, Irving Lefkovitz, Sigmund Lefkovitz, or Albert Schwartzberg, be personally liable for payment of any sums found to be due and owing from NRNH to 29-31 pursuant to paragraph B, above.

D. Notwithstanding anything to the contrary in paragraph C above, any amounts payable to 29-31 from the assets of NRNH shall be subject to a first and prior lien in favor of the Lefkovitz family interests to secure payment of the judgment entered against Jarnis pursuant to paragraph F under Proceeding 3, below. The basis for imposition of this lien is that Jarnis is the principal limited partner of 29-31 and DHD Corp., one of the Florida Limited Partnerships controlled by the Proceeding 3 Respondents, is the sole general partner of 29-31. The Proceeding 3 Respondents may discharge the lien upon satisfaction of the judgment, or upon the posting of a surety bond issued in favor of the Lefkovitz family interests, by a licensed surety maintaining an A.M. Best rating of A or better, in the amount of $4,100,996.86 to secure payment of any judgment entered in favor of the Lefkovitz family interests in connection with Proceeding 3, below.

E. 29-31 Associates, Sigmund Lefkovitz, Irving Lefkovitz and NRNH shall each bear their own attorney's fees and costs in connection with Proceeding 2.

F. All other claims and counterclaims in Proceeding 2 of this Arbitration are denied.

Proceeding 3.

A. The Arbitrator hereby incorporates by reference the following orders, rulings and directives: (i) June 26, 2000 Stipulation On Certain New Rochelle Nursing Home-Related Claims and Counterclaims and other stipulations and Agreements of the Parties; (ii) the January 10, 2001 Rulings by Arbitrator as to Burden of Proof and Legal Standard, (iii) the Arbitrator's January 24, 2002 Findings and Directives, (iv) the Arbitrator's April 19, 2002 Post Phase II Rulings On Certain Subsequent Issues, (v) the May 15, 2002 Rulings By Arbitrator Re Respondents' Motion For Reconsideration And Clarification Of January 24, 2002 Findings and Directives, (vi) the May 31, 2002 Ruling By Arbitrator Re Claimants' Motion to Strike Respondents' Supplement to the Record, (vii) the Arbitrator's June 24, 2002 Post Phase II Ruling Re: Albert Schwartzberg Commission, (viii) the August 8, 2002 Rulings by Arbitrator re; Compensation and Punitive Damages Issues, (ix) the Arbitrator's October 29, 2002 Rulings and Scheduling Determinations, (x) the Rulings by the Arbitrator at the November 21, 2002 hearing on disputed reimbursable expense items, and (xi) the December 2, 2002 Arbitrator Rulings re: Fees and Scheduling Determinations.

B. As a result of Respondents' breaches, the following individual Proceeding 3 Respondents are ordered to pay the following amounts as restitution to Jarnis for the

years 1991-2001, and shall be jointly and severally liable therefor:

1. Nathan Wagner: $1,276,537
2. Robert Goldman: $892,093
3. Albert Schwartzberg: $1,469,009

C. In addition, NCIS and New Century Investment Services, Inc., companies composted of and controlled by Respondents, are ordered to pay the following amounts as restitution to Jarnis for the years 1991-2001, for which Respondents shall also be jointly and severally liable:

1. NCIS Co. $1,426,686
2. New Century $2,186,616

D. All amounts repaid to Jarnis pursuant to paragraphs B and C above, shall be distributed to each of the Jarnis interest holders in accordance with their respective interests.

E. Until the confirmation of this Award, the service-related fees paid to the Phase 3 Respondents by Jarnis or any entity directly or indirectly owned or controlled by the Phase 3 Respondents and their family members and within the Jarnis corporate or partnership network shall be consistent with, and no greater than, those set forth in my January 24 and August 8, 2002 Rulings. Upon confirmation of this Award, no such fees shall be paid to any of the foregoing until all amounts set forth in paragraphs B, C, D, F and G are paid in full.

F. The Lefkovitz Family Interests are entitled to judgment jointly and severally against Nathan Wagner,

Robert Goldman, Albert Schwartzberg, Jay Felner and Jarnis, as follows:

Sigmund Lefkovitz	$451,768
Arlene Lefkovitz	$97,718
Glenn Paul Lefkovitz	$2,832
Irving Lefkovitz	$876,627
June Lefkovitz	$135,955
Sigmund Lefkovitz Family Trust for the Family of Shelly A. Loyd, u/a/d/ July 31, 1973, Gayle R. Dougherty, Trustee	$24,075
Sigmund Lefkovitz Family Trust for the Family of Glenn Paul Lefkovitz, u/a/d July 31, 1973, Nina Mann, Trustee	$21,243
Sigmund Lefkovitz Family Trust for the Family of Nina Mann, u/a/d July 31, 1973, Shelly Loyd, Trustee	$25,491
Sigmund Lefkovitz Family Trust for the Family of Gayle R. Dougherty, u/a/d July 31, 1973, Glenn Paul Lefkovitz, Trustee	$24,075
Sigmund Lefkovitz Family Trust for the Family of Donna Jean Neshek, u/a/d July 31, 1973, Shelley Loyd, Trustee	$21,243
Lefkovitz 1987 Family Trust, Glenn Lefkovitz, Gayle Dougherty and Donna Neshek Trustees	$552,318
Irving D. Lefkovitz Halsted No.2 Trust, u/a/d/ February 12, 1974, Sigmund Lefkovitz, Trustee	$26,908

Irving D. Lefkovitz Halsted No. 3 Trust, u/a/d/ February 12, 1974, Sigmund Lefkovitz, Trustee	$26,908
Irving D. Lefkovitz Halsted No. 4 Trust, u/a/d/ February 12, 1974, Sigmund Lefkovitz, Trustee	$26,908
Irving D. Lefkovitz Halsted No. 5 Trust, u/a/d/ February 12, 1974, Sigmund Lefkovitz, Trustee	$26,908
Lefkovitz Numbered Family Trust #7, Sigmund Lefkovitz, Trustee	$2,832

The judgment amounts set forth in this paragraph constitute the Lefkovitz family interest's allocate distributable share of the restitution amounts identified in paragraphs B and C. Any amounts distributed to the Lefkovitz family interests pursuant to paragraph D, above, shall be credited against the respective judgment amount, and any recoveries by any of the Lefkovitz family interests on the judgments shall be credited toward the respective distributions payable to them from Jarnis under paragraph D, above. In addition, any recoveries on the judgments paid from or recovered against the personal assets of Messrs. Wagner, Goldman, Schwartzberg or Felner shall be credited toward the restitution payable to Jarnis under paragraphs B and C above. However, no payments or distributions by Jarnis in full or partial satisfaction of these judgments, and no recoveries from the assets of Jarnis, whether by way of levy, execution or otherwise, shall in any way impair or offset Jarnis' right to full restitution under paragraphs B and C above. Enforcement of the money judgments arising from the confirmation of this Award shall be stayed for 30 days from the date of

said confirmation to give Phase 3 Respondents the opportunity to comply with paragraphs B, C, D, F and G.

G. For the reasons set forth in the April 19, 2002 and December 2, 2002 rulings of the Arbitrator, Jarnis is ordered to reimburse Claimants for approved legal fees and costs incurred in Proceeding 3, which total $1,857,186.20.

H. The Arbitrator specifically finds that Respondents failed to comply with the terms of the Jarnis Agreement regarding financial reporting and disclosure, and, specifically, that Respondents in their capacities as controlling partners failed to comply with the requirements of Paragraph 7.05(b) of the Jarnis Agreement, relating to disclosures regarding the payment of fees and other compensation to Partners and their affiliates.

Accordingly, I hereby appoint the accounting firm of BDO Seidman LLP to perform annual audits of Jarnis and its related entities and create audited financial statements for each of those entities for the years 1996 through 1999. These audits shall include review and verification of any materials called for in the Jarnis Agreement and the Florida Limited Partnership Agreements and the information called for in any reports to be generated under those agreements. Copies of the audit reports shall be provided to all Jarnis interest holders. BDO Seidman's reasonable fees and expenses shall be borne by Jarnis, as shall the reasonable fees and expenses of any successor firm. In the event that BDO Seidman is unable or unwilling to complete the engagement, the parties shall either agree on another accounting firm, or such firm may be selected by the Court under its power to enforce this Award.

I. The amendments to the Jarnis Agreement purportedly passed by Respondents and submitted to me on March 21, 2002, in Respondents' Supplement To The Record (and those brought to my attention by Claimants on April 19, 2002, via letter) are hereby stricken from the record and declared null, void and unenforceable as to this arbitration and all issues and disputes arising therefrom. In particular, they have no bearing on my ability to appoint auditors to conduct an independent accounting examination of past conduct by the fiduciaries in control of Jarnis. The Arbitrator makes no decision as to whether or to what extent the amendments may have validity on matters unrelated to this arbitration, as that issue is not before the Arbitrator.

J. All other claims and counterclaims in Proceeding 3 of this Arbitration are denied.

K. As to all proceedings, the administrative fees and expenses of the American Arbitration Association totaling $3,250.00 and the compensation and expenses of the Arbitrator totaling $562,812.24 shall be borne equally by the parties. Therefore, in consideration of advances previously made to the Association, proceeding 3 Respondents shall pay to proceeding 3 Claimants the sum of $67,221.46 in order to comply with this provision of the Award.

Dated: March 5, 2003

/s/ Robert M. Grossman
Robert M. Grossman, Arbitrator

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIGMUND LEFKOVITZ, *et al.*,	)	
Plaintiffs,	)	No. 97C7555
v.	)	Judge Elaine E. Bucklo
NATHAN WAGNER, *et al.*,	)	Magistrate Judge Morton Denlow
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM SUPPORTING THEIR MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

In their initial memorandum, defendants established that plaintiffs are contractually obligated to arbitrate their claims against defendants pursuant to the arbitration provisions contained in Section 13.11 of the General Partnership Agreement of Jarnis United Properties Co. (the "Jarnis Agreement") and Section 17 of the shareholder agreements of the Nevada Corporations (the "Shareholder Agreements"). In response, plaintiffs do *not* argue that the arbitration agreements are unenforceable and, indeed, concede that some of the claims they brought before this Court should be sent to arbitration. (Although it is impossible to determine from plaintiffs' filing which claims they now admit must be arbitrated.) Plaintiffs nevertheless contend that (1) certain claims are not covered by the arbitration agreements because they relate to the Florida Limited Partnerships ("FLP's") and the Realty Entities and (2) claims against the affiliated-business defendants, Wagner Associates, Robert U. Goldman, Ltd., NCIS Corp. and New Century Investors

Services, Inc., ("New Century") are not arbitrable because these defendants did not sign the Jarnis Agreement or the Shareholder Agreements. For the reasons stated below, and in defendants' initial memorandum, plaintiffs' arguments are factually and legally unsound and should be rejected.

I. PLAINTIFFS ADMIT THAT SOME OF THEIR CLAIMS AGAINST DEFENDANTS MUST BE ARBITRATED

In their response, plaintiffs concede that some of the claims they have filed in this Court must be arbitrated. (Res. Br. at 7.) Plaintiffs suggest that the Court "sever[]" the arbitrable claims and proceed with the remaining issues in this Court (Res. Br. at 2.) Therefore, defendants' motion to compel arbitration should be granted at least as to these claims.

However, it is impossible to determine from plaintiffs' complaint and their response which claims they concede are arbitrable. The complaint groups the defendants together, alleging a "conspiracy" involving all the defendants. (*See*, *e.g.*, Cmplt. ¶ 30 and Count II.) Plaintiffs' RICO count and claim of a conspiracy to defraud (Count II) are brought against all defendants and appear to include allegations that plaintiffs now admit are arbitrable. Indeed, each of the fourteen counts raised in plaintiffs' complaint incorporates all preceding allegations in the complaint. (*See* Cmplt. ¶¶ 46, 52, 59, 66, 73, 77, 81, 86, 90, 95, 101, 104, 109, 113.) Plaintiffs' drafted their complaint as an indivisible unit – each part relating back and incorporating *all* the allegations against *all* the defendants. Moreover, although plaintiffs admit generally in their response that some of their claims are arbitrable (Res. Br.

at 2, 7), they do not specifically identify which allegations and which counts they now agree to arbitrate.

For the reasons set forth in sections II and III of this memorandum, this Court should compel plaintiffs to arbitrate all their claims. At a minimum, however, this Court should order plaintiffs to replead their complaint, specifically identifying the parties, claims, allegations, and counts they contend can proceed in court and which claims, etc. they concede are subject to arbitration. After plaintiffs replead, defendants should be permitted to again move to compel arbitration based on the amended complaint.

II. PLAINTIFFS MUST ARBITRATE THEIR CLAIMS REGARDING THE FLP'S AND THE REALTY ENTITIES.

The arbitration provisions in the Jarnis Agreement and the Shareholder Agreements are broad, encompassing not only disputes regarding "interpretation" or "enforcement," but "any dispute or controversy arising under, out of or in connection with or in relation to" the agreements. (*See* Cmplt. Ex. D, Jarnis Agreement § 13.11; Cmplt. Ex. H, Shareholder Agreement § 17.) As the Seventh Circuit held in *Sweet Dreams Unlimited v. Dial A Mattress Int'l*, 1 F.3d 639 (7th Cir. 1993), broadly worded arbitration provisions like those at issue in this case reach "all disputes having their origin or genesis in the contract [and] any dispute . . . that is *in any way connected with* [the] contract." *Id.* at 642 (emphasis added). Given the broad arbitration provisions here, the federal policy that an order to arbitrate should be granted "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted

dispute," *see United Steelworkers of America v. Warrior & Gulf Nav. No.*, 363 U.S. 574, 552-83 (1960), and that plaintiffs' complaint is clearly grounded on the relationships, duties, and obligations established by the Jarnis Agreement and the Shareholder Agreements, plaintiffs should be compelled to arbitrate all their claims.

In their response, however, plaintiffs argue that their claims relating to services provided by defendants and their affiliates to the FLP's and the Realty Entities are not covered by the arbitration provisions. In support of this argument, plaintiffs note that the agreements governing "the 28 Realty Entities and the 25 Florida Limited Partnerships" do not contain arbitration provisions, while only "1 partnership agreement and 5 shareholder agreements" do. (Res. Br. at 1-2.) That is not the relevant consideration, however. The question is whether the arbitration provisions in the Jarnis Agreement and the Shareholder Agreements cover the disputes, whether or not the disputes also involve entities governed by agreements without arbitration provisions.

Plaintiffs support their argument by trying to establish that their allegations of conduct relating to the FLP's and the Realty Entities are "separate and distinct" from Jarnis and the Nevada Corporations and that "*Defendants' status as signatories [to the Jarnis Agreement and the Shareholder Agreements] is simply irrelevant.*" (Res. Br. at 9; emphasis added.) In so arguing, however, plaintiffs ignore that (1) the FLP's were created as part of a business organization with Janis and the Nevada Corporations and, by design, are completely controlled through Jarnis and the Nevada Corporations; (2) the Jarnis Agreement expressly addresses services provided by partners and their affiliates to the FLP's and the Realty Entities; and (3) if

plaintiffs have any rights relating to services provided to the FLP's and the Realty Entities, they arise from their ownership of partnership interests in Jarnis and shares of the Nevada Corporations since plaintiffs do not directly own any part of the FLP's or the Realty Entities.

First, the FLP's and the Realty Entities are controlled entirely through Jarnis and the Nevada Corporations. Plaintiffs' contention that the FLP's and the Realty Entities are separate from Jarnis and the Nevada Corporations contradicts the allegations in their complaint. Defendants are shocked that plaintiffs make this an issue because it has been understood by all parties since the formation of the entities that control of the businesses was to be centralized in Jarnis and the Nevada Corporations. For example, the Jarnis Confidential Private Offering Memorandum[1] clearly states the structure of the business entities and that Jarnis, the Nevada Corporations, and the FLP's were formed simultaneously to consolidate and centralize control of the parties' real estate holdings:

> [*Jarnis*] *is being formed to hold and own limited partnership interests in certain newly formed Florida limited partnerships* [a form limited partnership agreement is attached]. . . . the Florida Limited Partnerships are being formed to hold and own minority interests in certain general and limited partnerships which own or hold certain interest in real estate (the "Realty Entities"). . . . [T]he Family Unit members will benefit from the shared management derived from the formation of Jarnis. . . . (3-4; emphasis added)

[1] The Memorandum was provided to all of the partners in Jarnis and the shareholders of the Nevada Corporations prior to their investment. A true and correct copy is attached as Exhibit A hereto.

* * *

> *Jarnis will be a limited partner in each of twenty-five (25) Florida Limited Partnerships. . . . The sole general partner of each Florida Limited Partnership is a newly formed Nevada corporation. . . .* Each Florida Limited Partnership will hold the beneficial interest in [a] Realty Interest. . . . *The officers, directors and shareholders of each [Nevada] corporation are set forth in Exhibit B hereto. Each officer, director and shareholder will be a Partner in Jarnis or an Affiliate of a Partner.* (10-11; emphasis added)

As this memorandum makes clear, the FLP's and Realty Entities are not independent of Jarnis and the Nevada Corporations: control of these companies is entirely through Jarnis and the Nevada Corporations.

Moreover, defendants' control of the entities is the central allegation of plaintiffs' complaint. Thus, the position plaintiffs take in their response – that their claims relating to the FLP's and the Realty Entities are "separate and distinct" from Jarnis and the Nevada Corporations – is belied by their allegations that: the "purpose of the reorganization [during which Jarnis, the Nevada Corporations, and the FLP's were formed] was to centralize the management and operations of the [Realty Entities] and their related investments" (Cmplt. ¶ 17); defendants control Jarnis through their ownership of more than 50% of the partnership interests (*id.* ¶ 22); the FLP's are controlled by their general partners, the Nevada Corporations, and their Limited partner, Jarnis (*id.* at 23); and the Nevada Corporations are controlled by defendants through their "majority of seats on the board of directors of each of the Nevada Corporations" (*id.* at 24).

Indeed, plaintiffs allege that "[p]ursuant to these various provisions . . . defendants . . . control and at times relevant herein have controlled the management and operation of Jarnis, the FLP's and the Nevada Corporation" (*id.* at 25) and their entire complaint relies on the control defendants have over the operations of Jarnis and the Nevada Corporations, and – through these entities – the FLP's and the Realty Entities. Plaintiffs should not be allowed to now ignore the allegations in their complaint, and the facts, simply as a way of evading their agreement to arbitrate.

Second, the provision of services by defendants to the FLP's and the Realty Entities is expressly addressed in the Jarnis Agreement. Section 6.01 of the Jarnis Agreement provides that partners have the right to engage the services of any partner or affiliate of any partner for management and other services, including "all services related to the acquisition and development of *Property*; . . . arranging the sale, exchange or lease of *Property*; [and] *Property* management" "Property" is defined to mean "any one or all of the businesses, properties and assets owned *directly or indirectly*, through another partnership or partnerships or otherwise, by the Partnership." (*See* Cmplt. Ex. D, Jarnis Agreement § 1.33; emphasis added.) Therefore, the provision of services by defendants and their affiliates directly to the Realty Entities, or indirectly through the FLP's, is specifically addressed in the Jarnis Agreement. Clearly plaintiffs' claims relating to these same services "arise[] under, out of or in connection with or in relation to" the Jarnis Agreement.

Third, if plaintiffs have any rights concerning services provided to the FLP's and the Realty Entities they arise through their ownership of partnership interests in Jarnis

and shares of the Nevada Corporations. *Plaintiffs are not limited or general partners of the FLP's or the Realty Entities.* Indeed, plaintiffs allege in their complaint that "Jarnis and the Nevada Corporations [hold] 100% of the FLP's which in turn own approximately 100% of the interests held by the plaintiffs, defendants Nathan and Susan Wagner, Goldman, Felner and Schwartzberg and members of the defendants' families action in their individual capacities and on behalf of various trusts in the Realty Entities." (Cmplt. ¶ 21.)

Plaintiffs argue in their response that this case involves more than Jarnis and the Nevada Corporations; it "encompasses claims of over 50 additional limited partnerships." (Res. Br. at 2.) Plaintiffs, however, clearly have no standing to assert either the "claims of over 50 additional limited partnerships," in which they have no direct ownership interest, or the claims of the Nevada Corporations. Deciding the standing issue, however, is not necessary to resolve this motion. Plaintiffs' lack of relationship to the FLP's and the Realty Entities is only important, at this stage, to show that their only possible interests in these entities comes through Jarnis and the Nevada Corporations, which are governed by agreements containing broad arbitration clauses.

On a related point, plaintiffs argue that their claims regarding the professional accounting and legal services provided by defendants Susan and Nathan Wagner, Wagner Associates, Robert U. Goldman, and Robert U. Goldman, Ltd., are not arbitrable because these claims involve duties these defendants owned plaintiffs as their accountants and attorney: "while these defendants' actions as accountants and attorney relate to their activities in Jarnis and the Nevada Corporation, they too arose from

an independent duty to exercise their duties in good faith and not violate the mutual trust which existed between these defendants *and their clients, the plaintiffs*." (Res. Br. at 11; emphasis added.) In fact, however, none of the claims raised in plaintiffs' complaint involve accounting and legal services *provided to the plaintiffs*; instead, they relate to services provided to Jarnis, the Nevada Corporations, the FLP's, and the Realty Entities. (*See, e.g.*, Cmplt. ¶¶ 82, 106.) *Plaintiffs were not defendants' clients*; Jarnis, the Nevada Corporations, the FLP's, and the Realty Entities were. Again, a standing issue is apparent but unnecessary to resolve. The important point is that plaintiffs only rights relating to the professional services provided by defendants, if any, come through their ownership interests in Jarnis and the Nevada Corporations and therefore any claims relating to these services are arbitrable.[2]

Plaintiffs also argue that disputes regarding services provided to the FLP's and the Realty Entities are not arbitrable because the arbitration provisions in the Jarnis Agreement and the Shareholder Agreements only cover

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[2] The only case plaintiffs cite in support of their argument regarding professional services is *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359 (ND. Ill. 1990). *Zechman* involved a dispute between a securities broker-dealer and its former agent. The parties had agreed to arbitrate any claim that "arises out of the Exchange business." The Court held that the former agents' claims for retaliatory discharge and recovery of an unpaid bonus were arbitrable, but that the agents' claims for defamation and recovery for unused vacation and sick days were not because these claims were "far to remote" to trigger the arbitration agreement. *Id.* at 1368-69. Given the obvious factual distinctions between *Zechman* and this case, defendants fail to see how that case has any bearing on the professional services issue here.

disputes regarding defendants' "status or activities as signatories to" the Jarnis Agreement or the Shareholder Agreements, not "matters outside the management or operation of Jarnis or the Nevada Corporations." (Res. Br. at 9a. Contrary to plaintiffs' argument, nothing in the arbitration provisions restricts the duty to arbitrate to disputes relating to the "status or activities" of the parties as signatories to the agreements and nothing in these provisions limits their application to "the management or operation of Jarnis or the Nevada Corporations." The provisions cover "any dispute of controversy arising under, out of or in connection with or in relation to" the agreements. If the parties intended to limit the provisions in the manner argued by plaintiffs they could easily have done so. Plaintiffs' proposed reading strains the plain language of the provisions and clearly is contrary to the federal policy that arbitration agreements should be read broadly and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Plaintiffs rely on two cases to support their proposed reading of the arbitration provisions, *Leadertex Inc. v. Morgantown Dyeing & Finishing Corp.*, 67 F.3d 20 (2d Cir. 1995) and *Coors Brewing Co. v. Malson Breweries*, 51 F.3d 1511 (10th Cir. 1995). Neither of these cases is controlling authority and both are easily distinguished.

In *Leadertex*, the plaintiff textile company had entered into several contracts with the defendant for dyeing services and warehousing, each containing a clause requiring the parties to arbitrate "[a]ny controversy arising under or in relation to this order or contract" 67 F.3d at 22-23. A dispute arose over defective goods. Later,

the defendant allegedly defamed the plaintiff by telling a manufacturer's representative that plaintiff deliberately supplied its customers with substandard goods." *Id.* at 28. The Court held that the claims relating to the defective goods were arbitrable, but that the defamation claim was not, finding that the parties did not intend for the arbitration clause to "extend to a defamation claim based on statements about subjects other than Morganton's services for Leadertex." *Id.* at 28-29. In *Leadertex*, the contracts containing the arbitration clauses were for limited short-term services, and the claim that was held to not be arbitrable was a separate, independent tort unrelated to the subject of the contract. Here, on the other hand, the arbitration clauses are contained in a partnership agreement and shareholder agreements – long-term documents governing the relationship of the parties regarding thousands of transactions. Further, the claims at issue here relate directly to the operation and management of the parties' business holdings – not a separate and independent tort like defamation or assault.

Plaintiffs cite *Coors*, not for its holding in a similar factual situation, but for one quote: "it is simply fortuitous that the parties happened to have a contractual relationship" (*See Res.* Br. at 9-10, citing *Coors*.) The *Coors* court made that statement in the context of a hypothetical case:

> [I]f two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship.

Coors, 51 F.3d at 1516. Here, however, the allegations plaintiffs raise against defendants relating to services provided to the FLP's and the Realty Entities are directly connected to defendants' management and control of Jarnis and the Nevada Corporations, anti plaintiffs' allegations relating to the FLP's and the Realty Entities arise from their ownership interests in Jarnis and the Nevada Corporations. Plaintiffs' reliance on *Coors*, therefore, is completely misplaced.

III. PLAINTIFFS MUST ARBITRATE THEIR CLAIMS AGAINST THE BUSINESS DEFENDANTS.

Defendants established in their initial memorandum that plaintiffs must arbitrate their claims against the business defendants, Wagner Associates, Robert U. Goldman, Ltd., NCIS Corp. and New Century Services Inc., even though these defendants are not parties to the Jarnis Agreement or the Shareholder Agreements, in part, because plaintiffs' claims against the business defendants are inextricably intertwined with their claims against the individual defendants.[3] Plaintiffs did not even attempt in their complaint to differentiate between the defendants, instead alleging a "conspiracy" involving all defendants.

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[3] Defendants also demonstrated that plaintiffs must arbitrate their claims against the business defendants because each of the business defendants is owned and operated by one or more of the individual defendants and they are defined in the Jarnis Agreement as "Affiliates"; therefore, these defendants are agents of the individual defendants and intended beneficiaries of the Jarnis agreement entitled to enforce the arbitration provision. *See Messing v. Rosenkrantz*, 872 F. Supp. 539, 541 (N.D. Ill. 1995) (an agreement to arbitrate "covers nonsignatories under common law contract and agency principles").

The only claims plaintiffs assert against Wagner Associates and Robert U. Goldman, Ltd. are identical to the claims asserted against Nathan Wagner and Goldman; and the only claims plaintiffs assert against NCIS Corp. and New Century are Counts I (RICO) and II (conspiracy to defraud), which they assert against all defendants. Indeed, the claims against the business defendants incorporate all the allegations against all the defendants.

Despite the way plaintiffs drafted their complaint – treating the defendants as a group and relating all the allegations together, plaintiffs argue in their response that their claims against the individual defendants and the business defendants are not intertwined because the "scheme to defraud alleged by plaintiffs involves distinct and separate component": (1) the "individual defendants' conduct as partners in approving the payment of fraudulent and excessive fees"; and (2) the business defendants' conduct in seeking excessive, duplicative and fraudulent fees." (Res. Br. at 13-14.) Apparently, plaintiffs are now attempting to distinguish (for purposes of this motion), for example, the actions of Robert U. Goldman in approving the payment of legal fees, on the one hand, and the actions of Robert U. Goldman on behalf of Robert U. Goldman, Ltd. in seeking the same legal fees, on the other hand. Not surprisingly, plaintiffs cite no authority for this unique argument and there is nothing in the complaint to suggest that plaintiffs are asserting "distinct and separate components" of fraud against different defendants. Plaintiffs again are attempting to avoid the allegations in their complaint to evade their agreements to arbitrate. They should not be allowed to do so.

In support of their position on this issue, plaintiffs cite one case, *IDS Life Insurance Co. v. SunAmerica, Inc.*, 103

F.3d 524 (7th Cir. 1996). In *IDS*, a life insurance company and a securities broker-dealer (both members of the NASD) filed two separate complaints against four defendants; two were members of the NASD and two were not. *Id.* at 525. Under NASD rules, members are required to arbitrate most of their disputes. The defendants argued that the plaintiffs were required to arbitrate their claims not only against the NASD members but also against the two non-member defendants, because the issues were identical. *Id.* at 529. The Seventh Circuit rejected this argument, holding that it would be ridiculous to assume that parties have to arbitrate simply because other parties are resolving identical issues in arbitration. *Id.* The court noted that the defendants did not base their argument on the relationship between the defendants, only on the identity of issues.

Here, unlike *IDS*, defendants are not arguing that plaintiffs should be required to arbitrate their claims against the business defendants because the issues are identical to the issues plaintiffs raise against the individual defendants. Plaintiffs should be required to arbitrate against the business defendants because their claims against these defendants are inextricably tied, factually and legally, to the claims against the individual defendants as well as the rights and duties of the parties under the Jarnis Agreement and the Shareholder Agreements, which contain the arbitration provisions. Unlike the *IDS* defendants, here the business defendants and the individual defendants are affiliates and the same with respect to their relationship to plaintiffs. While the non-member *IDS* defendants were a large insurance company and a publicly traded holding company and provider of mutual funds, the business defendants here are small service businesses

wholly-owned and operated by the individual defendants subject to the arbitration provisions. Moreover, the alleged improper activities of the business defendants are precisely the same activities as the activities allegedly engaged in by the individual defendants, involving the very same actors. *IDS*, therefore, is not controlling because it involves a different legal analysis in a factually distinct context.

Finally, it is important to note that defendants at any time could cause the business defendants to enter into arbitration agreements with Jarnis, the Nevada Corporations, the FLP's, and the Realty Entities, requiring the arbitration of all disputes relating to services provided to the companies. As plaintiffs allege in their complaint, the individual defendants control Jarnis, the Nevada Corporations, the FLP's, and the Realty Entities, as well as the business defendants. Defendants believe, that going through that formality is unnecessary, however, because the arbitration provisions in the Jarnis Agreement and the Shareholder Agreements plainly encompass plaintiffs' claims against the business defendants.

CONCLUSION

For the reasons set forth above, and in defendants' initial memorandum, plaintiffs should be compelled to arbitrate all their claims against defendants pursuant to Section 4 of the Federal Arbitration Act. Alternatively, because plaintiffs concede that some of their claims must be arbitrated, they should be required to replead their complaint so that defendants and the Court can separately address whether the remaining claims are also subject to arbitration.

In any event, this Court should stay proceedings on the merits pending arbitration under 9 U.S.C. § 3. In the alternative, this Court has the authority to dismiss the complaint after compelling plaintiffs to arbitrate. *See, e.g., Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) ("The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration") (citing cases).

Dated: March 20, 1998

Respectfully submitted,

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In the Supreme Court of the United States

JARNIS UNITED PROPERTIES CO.,

Petitioner,

v.

SIGMUND LEFKOVITZ, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

I. This Court Should Review The Seventh Circuit's Ruling That Arbitrators May Impose Financial Obligations On Nonparties. 1

II. Petitioner Had A Right To Intervene To Seek Vacatur Of The Award Issued Against It. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Bruscianelli v. *Triemstra*, 2000 WL 1100439 (N.D. Ill. Aug. 4, 2000) 8

Commonwealth Coatings v. *Continental Cas. Co.*, 393 U.S. 145 (1968) 2

DiGhello v. *Busconi*, 673 F. Supp. 85 (D. Conn. 1987), aff'd, 849 F.2d 1467 (2d Cir. 1988) (table) 7

Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 5

Izumi v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 9

Maul v. *Aznavoorian*, 1997 WL 16313 (N.D. Cal. Jan. 9, 1997) 8

Moseley, Hallgarten, Estabrook & Weeden, Inc. v. *Ellis*, 849 F.2d 264 (7th Cir. 1988) 9

Nationwide Mut. Ins. Co. v. *Home Ins. Co.*, 330 F.3d 843 (6th Cir. 2003) 4

Orion Shipping & Trading Co. v. *Eastern States Petroleum Corp.*, 312 F.2d 300 (2d Cir. 1963) ..... *passim*

Productos Mercantiles e Industriales, S.A. v. *Faberge USA, Inc.*, 1993 WL 362391 (S.D.N.Y. Sept. 14, 1993) 8

UAW v. *Scofield*, 382 U.S. 205 (1965) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

Zenith Radio Corp. v. *Hazeltine*,
395 U.S. 100 (1969) 6

Statute

9 U.S.C. § 10(a)(4) 1

Other Authorities

Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996) 2

4 I. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 40.5.3 (1999 Supp.) 1

Martin, Note, *Advanced Micro Devices v. Intel Corp. and Judicial Review of Commercial Arbitration Awards: When Does a Remedy 'Exceed' Arbitral Powers?*, 46 HASTINGS L.J. 1907 (1995) 1

REPLY BRIEF FOR PETITIONER

Respondents cannot explain how an award of relief against a nonparty falls within an arbitrator's authority. By holding that it does, the Seventh Circuit ratified a gross violation of the fundamental right to notice and an opportunity to be heard before being deprived of property and thereby created a circuit conflict over an issue of great significance. Prompt resolution of that conflict is vitally important. If arbitration is to continue to serve as a practicable alternative to litigation, it is essential that arbitral awards impose obligations only on arbitral parties.

I. This Court Should Review The Seventh Circuit's Ruling That Arbitrators May Impose Financial Obligations On Nonparties.

1. Respondents contend that this case rests on "state law, not federal law." Br. 4. But the question presented concerns the meaning of a *federal* statutory provision—9 U.S.C. § 10(a)(4)—and in particular whether arbitrators exceed their powers by awarding relief against a nonparty.

2. Granting the petition will allow the Court to address the meaning of "exceeded their powers," a question that has generated uncertainty in the lower courts. See 4 I. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 40.5.3 (1999 Supp.); Martin, Note, *Advanced Micro Devices v. Intel Corp. and Judicial Review of Commercial Arbitration Awards: When Does a Remedy 'Exceed' Arbitral Powers?*, 46 Hastings L.J. 1907, 1937 (1995) (noting "the uncertainty in the courts" over when arbitrators' remedies exceed their authority). Guidance on that question is much needed. The Court has never addressed the meaning of "exceeded their powers" in § 10(a)(4) and has not addressed any of the FAA's grounds for vacatur since its decision addressing arbitrator bias in

Commonwealth Coatings v. *Continental Cas. Co.*, 393 U.S. 145 (1968).

3. Respondents also contend that this case rests on "unique facts." Br. 3. To be sure, the underlying dispute involved disputed facts, as in most cases reviewed by this Court. But the question presented does not require resolution of those factual disputes. It involves a pure legal issue—whether an arbitrator's award may impose financial obligations on a nonparty to the arbitration.

The award indisputably did so here. As respondents admit, "Jarnis was not formally named as a party to the arbitration" and yet the arbitrator "ordered Jarnis [to] pay the Lefkovitzes' attorneys' fees of approximately $1.8 million." Br. 3. And respondents do not deny that the arbitrator further ordered Jarnis to pay for the preparation of dozens of audited financial statements and made Jarnis jointly and severally liable for millions of dollars more in awarded damages. See Pet. 4. Respondents wrongly suggest that Jarnis "did not incur 'substantial financial obligations'" because the award provided Jarnis partners (*i.e.* respondents) with a net gain. Br. 12-13. If shareholders won damages in a suit against General Motors, their gain would not mean that GM suffered no loss. And, to analogize more closely to this case, imposing damages on GM in a suit solely between GM shareholders plainly would violate GM's rights.

4. Respondents do not deny that it is a basic principle of arbitration law that an arbitrator exceeds his authority by awarding relief against a nonparty to the arbitration. See Pet. 8-9; see also Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 753 (1996) ("if an arbitrator decides an issue involving a nonparty to the arbitration agreement, vacatur is appropriate under section

10(a)(4)"). Instead, respondents assert that this question is not of "national importance." Br. 4. In fact, the ruling below throws into question the consensual nature of arbitration, the right to notice and an opportunity to be heard before being ordered to expend millions of dollars, and the very viability of the arbitral process. See Pet. 10, 14-15. The importance of these issues is manifest.

Respondents try to diminish the significance of the rulings below by calling Jarnis' nonparty status a "hyper-technicality." Br. 13. But there is nothing "hyper-technical" about the right to receive notice and an opportunity to be heard before being ordered by an arbitrator to pay millions of dollars in attorneys' and audit fees. The issue here is whether arbitration is to be a fair and consensual process or an ambush. If an arbitrator may impose relief against an entity that was never named an arbitral party, never served with arbitral papers, and never notified that substantial financial obligations might be imposed upon it, arbitration will become an intolerable minefield. Every affiliate of an arbitral party will face the risk of having relief ordered against it, even if no claim against it is pending. The inevitable result will be costly protective interventions (see Pet. 10) and widespread increases in liability insurance premiums.

5. The existence of a circuit conflict over this fundamental issue is undeniable, notwithstanding the Seventh Circuit's attempt to bury it. According to the Seventh Circuit, an arbitrator may award relief against a nonparty if it is controlled by a party. According to the Second Circuit, in contrast, an arbitrator may not award relief against a nonparty, no matter what the relationship between the nonparty and a party. *Orion*, 312 F.2d at 300 (see Pet. 7-8). These decisions cannot be reconciled.

Respondents claim there is no conflict because the facts and circumstances presented in *Orion* are not "remotely similar to the facts presented here." Br. 14. Facts of course vary from case to case. But the *relevant* facts in *Orion* and this case are virtually identical. In both cases, the arbitrator awarded relief against a nonparty based on an affiliation between the nonparty and an arbitral party. In *Orion*, the Second Circuit said the arbitrator "exceeded his powers" by awarding relief against the party's nonparty parent, based on a supposed controlling alter ego relationship. 312 F.2d at 300. The Second Circuit said the arbitrator had no authority to engage in such veil-piercing where the parent was not before the arbitrator. *Ibid.* In this case, the Seventh Circuit sanctioned the arbitrator's veil-piercing because of a supposed controlling relationship between certain arbitral parties and non-party Jarnis. Pet. App. 5a-7a. Those divergent rulings represent a sharp conflict and one that should be nipped in the bud to prevent the dangerous notion that arbitrators may award relief against nonparties from taking root.

Respondents' attempts to distinguish the many cases adhering to the *Orion* principle are equally unavailing. Br. 14-15. In each case, notwithstanding differing facts, the courts decisively recognized that "[a]n arbitration panel may not determine the rights or obligations of non-parties to the arbitration." *Nationwide*, 330 F.3d at 846; see Pet. 8.

Respondents say this case is different because of a purported lack of a "practical distinction" between the Jarnis partners who were parties to the arbitration and Jarnis itself. Br. 16. But the same could be said of many affiliated companies, and yet the law properly recognizes and gives effect to the formal distinctions between them.

See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474-475 (2003) (piercing the veil is a "rare exception" to the general rule that "the corporation and its shareholders are distinct entities"). In *Orion*, whether there was a "practical distinction" between the non-party parent and the party subsidiary made no difference to the Second Circuit's ruling that the arbitrator exceeded his powers by awarding relief against the non-party parent. 312 F.2d at 300. Here, too, if the arbitral claimants desired relief against Jarnis, they should have filed a claim against Jarnis notwithstanding any relationship between other parties and Jarnis. Jarnis was legally independent and separate from those parties, and an arbitration involving one could not lawfully result in an award against the other. The Seventh Circuit departed from that principle here.

Respondents further try to distinguish *Orion* and its progeny on the ground that the nonparties in those cases were "corporations" rather than a "general partnership." Br. 17. But the nature of the nonparty entity is not the point. The legal question is whether an arbitrator can award relief against an entity that was never named an arbitral party, was never served with arbitral papers, and never participated in the arbitration. The type of business entity at issue was not the crux of any of the cases answering that question in the negative. Nor can this case be distinguished from *Orion* and its progeny by the fact that the arbitration provision "appears in the partnership agreement itself." Br. 15. The point is not the location of the arbitration provision but the fact that no party *ever* filed any arbitration claims against Jarnis. If there had been any such claims, Jarnis could have responded to the arbitrator or sought judicial relief. Instead, Jarnis faces severe financial and other obligations without ever having had an opportunity to defend itself.

6. Respondents attempt to defend the imposition of damages and other obligations on a nonparty by repeatedly asserting that four of Jarnis' partners, who were parties to the arbitration, "controlled" Jarnis and that the arbitrator's award against Jarnis therefore amounted to an award against those four partners. They do not and cannot deny that those four partners held only a 36% interest in Jarnis. See Pet. 14. Instead, they manufacture "control" by impermissibly adding interests held by independent adult relatives of the four partners and by independent trustees. Br. 6. They also rely on supposed admissions made by defendants in the district court. Br. 14. But even if the district court defendants made such admissions (they did not as explained in the petition at 19), respondents offer no reason why any such admissions would bind Jarnis, which was denied any right to participate in the district court proceeding. See *Zenith Radio*, 395 U.S. at 110 (nonparty parent not bound by subsidiary's stipulation).

In any event, whether any arbitral parties controlled Jarnis is a red herring. As explained in the petition (at 10), General Electric wholly owns and thus controls NBC, but that does not mean that an arbitrator may award relief against GE where NBC but not GE is a party. If the arbitrator believed that financial obligations should be imposed on four of Jarnis' general partners, he should have awarded relief against them. They were parties to the proceeding and thus had an opportunity to mount a defense, unlike Jarnis, which was absent from the proceeding and had no opportunity to defend itself or any reason to think that a defense was necessary. Jarnis' right to defend its interests does not depend on the arbitrator's belief as to whether the four partners controlled Jarnis.

7. The fact remains that respondents never asked the arbitrator to impose damages, attorneys' fees, or audit

fees on Jarnis, and they do not contend otherwise. They try to excuse their failure to name Jarnis as an arbitral party by contending that Jarnis did not have the capacity to be sued under Florida law when the initial district court lawsuit was filed in 1997. Br. 17-18, 22. But they admit that Florida law changed as of January 1, 1998 (Br. 2 n.2) and that Jarnis thereafter could have been named as a respondent in the arbitration, which was not initiated until later in 1998. It is undisputed that Jarnis was not named as an arbitral party in 1998—nor at any time in the five-year-long arbitration. Respondents thus cannot blame their failure to name Jarnis as a party on Florida law. At bottom, they did not name Jarnis because their dispute was not with Jarnis but only with certain Jarnis partners. Accordingly, the arbitrator exceeded his authority by awarding relief against Jarnis.

8. Respondents cite no cases, other than the ruling below, holding that an arbitrator acts within his powers by imposing relief on a nonparty to the arbitration. Instead they cite several inapplicable district court cases.

Respondents contend (Br. 15-16) that the court in *DiGhello* v. *Busconi*, 673 F. Supp. 85 (D. Conn. 1987), upheld an award that bound four nonparty corporations owned and controlled by an arbitral party. In fact, "the four corporate entities were designated as respondents in the arbitration proceedings." *Id.* at 89. In addition, the governing arbitration provision expressly stated that it "shall apply to all entities owned or controlled by the parties hereto." *Id.* at 88. In this case, in contrast, Jarnis was never designated as a respondent in the arbitration, and the applicable arbitration provision said nothing about entities owned or controlled by arbitral parties. Hence, *DiGhello* is far off point.